Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES
April Term, 1995

MATTHEW AND LEA DARRAH, AKA LEA TYLER,
Petitioners,

v.

CHILDREN'S HOME SOCIETY OF CALIFORNIA, DEE HESZLER, DAVIS CRISIS PREGNANCY CENTER, KATHY HUNTZIKER, et. al.,
Respondents.

On Petition for Writ of Certiorari to the California State Court of Appeals for the Third Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause of the Constitution of the United States requires a state licensed and regulated adoption agency to comply with state mandated regulations in order to obtain a knowing, voluntary and intelligent relinquishment of parental rights.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MATTHEW AND LEA DARRAH, AKA LEA TYLER,
Petitioners

v.

CHILDREN'S HOME SOCIETY OF CALIFORNIA, DEE HESZLER, DAVIS CRISIS PREGNANCY CENTER, KATHY HUNTZIKER, et. al.,
Respondents.

On Petition for Writ of Certiorari to the California State Court of Appeals for the Third Appellate District

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Petitioners, Matthew and Lea Darrah, respectfully petition this Court for a writ of certiorari to review the judgment of the California Court of Appeals for the Third Appellate District, issued October 21, 1994, herein.

OPINIONS BELOW

The opinion of the California Court of Appeals is reported at (1994) 29 C.A.4th 511. [Appendix 3.] The opinion of the trial court is unreported. [Appendix 4.]

JURISDICTION

The California Appellate Court entered its judgment on January 9, 1995, [appendix 1] following denial of Petition for Review by the Supreme Court of California on January 5, 1995. [Appendix 2.] The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATE REGULATIONS INVOLVED

California Code of Regulations, Subchapter 5, articles 1 - 3, sections 35129 through 35169, prescribe the sole and exclusive process through which a valid, lawful relinquishment of parental rights may be obtained by the state or

agencies acting under the license and authority of the state. [Appendix 6.]

INTRODUCTORY STATEMENT

The review sought herein follows the termination of petitioners' parental rights by way of relinquishment and the placement of petitioners' child for adoption on May 4, 1991, on the basis of relinquishments obtained by Children's Home Society of California, a state licensed and regulated private adoption agency, doing business in and throughout the State of California.

The evidence presented at trial in this matter established that Children's Home Society of California violated numerous state regulations in the process of obtaining relinquishments of parental rights from petitioners. [Appendix 5.] The trial court nonetheless held that the relinquishments were legally obtained and

found no violation of petitioners' due process rights. The decision of the trial court was upheld by the California Court of Appeals, which found that while many regulations were violated, the Due Process Clause does not require adherence to state mandated regulations in order to secure a valid relinquishment of parental rights, since the state regulations are not required by federal Constitutional guarantees of procedural due process.

A. FACTUAL BACKGROUND

On April 24, 1991, petitioner Lea Darrah gave birth to a premature baby girl, alone and unattended on the bathroom floor of her college dormitory. The baby's father, petitioner Matthew Darrah, was five hundred miles away attending another college. The parents ultimately made contact with Davis Crisis Pregnancy Center, an unlicensed,

unregulated fundamentalist Christian organization, which advertised free services to unwed mothers in the college newspaper. The Crisis Pregnancy Center immediately brought Children's Home Society of California into the situation and within ten days, the adoption agency obtained relinquishments from petitioners.

The circumstances surrounding the relinquishment of the child have been the subject of long dispute. It was contended by Children's Home Society and the Davis Crisis Pregnancy Center that petitioners wanted to relinquish their baby and that the agency merely provided them with services to accomplish that goal.

It was contended by petitioners that they never wanted to place their child for adoption, but that their ability to care for and parent the child was grossly

undermined and negated by the adoption worker and the crisis pregnancy center worker, until petitioners were ultimately persuaded that keeping the baby was not a viable or proper option.

The trial court accepted the version of facts offered by the agency and concluded that petitioners wanted to place the child for adoption.

Regardless of whose version of what occurred is believed, two crucial facts are undisputed: (1) Petitioners were lawfully entitled to the procedural safeguards and protections mandated by the state regulations, irrespective of their state of mind when they dealt with the adoption agency; and (2) the agency failed to provide petitioners with the procedural safeguards and protections mandated by the regulations.

It is the position of petitioners that where the state acts to identify and mandate a regulatory process which is designed and created to protect the most valued of human rights -- the right to parent one's child -- that agency adherence to that regulatory process is required in order to assure a free and voluntary relinquishment of these protected rights, and that the failure of an agency to abide by such regulations constitutes a violation of the Due Process Clause of the United States Constitution.

B. SUMMARY OF AGENCY VIOLATIONS.

The state regulations governing the conduct of adoption agencies are set forth in the California Code of Regulations, Subchapter 5, articles 1 - 3, sections 35129 through 35169. [Appendix 6.] These regulations

prescribe the sole and exclusive process through which a valid, lawful relinquishment of parental rights may be obtained by the state or agencies acting under the license and authority of the state.

Petitioners established at trial that many regulations were violated by Children's Home Society in their efforts to obtain relinquishments. [Appendix 5]. The Court of Appeals, however, held that the evidence regarding certain of the violations was conflicting and that where they identified a conflict between whether a regulation was or was not complied with, they found in favor of upholding the judgment of the trial court.

The following is a summary of the regulations at issue and their individual

and cumulative impact on the validity of the relinquishment process:

1. Section 35129 - Face-to Face Interview:

This regulation requires a minimum of two face-to-face interviews by the agency with the relinquishing parent, prior to obtaining a relinquishment. In this situation, petitioner Matt Darrah resided in the southern portion of the state and had virtually no meaningful contact with the agency. He was indisputably at no time afforded the benefit contemplated by this regulation. Matt's first and only meeting with the social worker prior to relinquishment was on May 1, 1991, when he was flown by the agency's proposed adoptive parents to meet the proposed adoptive couple. All testimony at trial confirmed that there were only two meetings between Matt and

the adoption worker -- one was this meeting with the adoptive parents, at which the adoption worker acted as liaison between the parent and the proposed adoptive couple, and the other was when the worker obtained the relinquishments on May 4, 1991. There were no other meetings. There was no time that Matt was ever alone with, spoke personally with, counselled with, was interviewed by, or had what could conceivably be considered the "face-to face" interview contemplated and required by the regulation. The Court of Appeals held that this meeting between Matt, Lea, the social worker and the adoptive parents, in a public park, together with the subsequent meeting in which the agency obtained the relinquishments, satisfied the requirements of the regulation. It cannot reasonably be

assumed that the conduct of the agency constituted meaningful compliance with the intent of the regulation -- i.e., to ensure that the contemplated relinquishment is fully informed, free and voluntary.

2. **Sections 35133, 35134 - Counseling**:

This regulation requires that prior to accepting a parent's relinquishment of a child for adoption, the agency "shall" provide counseling as required for the particular category of parent. The regulation lists specific information that must be conveyed to parents, with certain requirements for mothers and "presumed" fathers, and somewhat different requirements for "alleged" fathers. The section goes on to require that parents be provided a very comprehensive and specific form of counseling by the agency prior to

obtaining a relinquishment. Through counseling mandated to include the specifically identified rights, options, and resources, the regulation seeks to ensure a decision by parents that is fully informed, free, and voluntary, thereby assuring that the outcome will be appropriately final and binding for all. In this situation, no counseling was provided to petitioners, particularly in relation to petitioner Matthew Darrah, with whom there was virtually no meaningful contact prior to the relinquishment.

The regulation requires that the following specific subject matters be included in the agency's counseling with a parent contemplating relinquishment:

a. Right to an Attorney - Section 34134(a)(2)

This provision requires the agency to advise parents of their right to seek counsel and to make referrals to counsel when appropriate. Defendants admit that petitioners were not advised of their right to an attorney, nor were they referred to an attorney for representation. The Court of Appeals however held that the fact that the agency gave the parents a single-spaced, multi-page form called a Statement of Understanding, setting forth in fine print all requisite information, that this was adequate compliance and advisement of rights. [Ct. App. Opinion, pp. 18-19.] The regulations, however, require that <u>each</u> of the various forms of counseling be provided to parents **and** that a copy of the statement of understanding be provided -- <u>not one or the other</u>. The regulations seek to

ensure that parents are provided a meaningful advisement of rights, not merely the appearance of such. The Court of Appeals also held that petitioners failed to prove prejudice or make a showing that they were unaware of their right to legal counsel as a result of being uninformed of that right by the agency, rendering the violation by the agency harmless. Despite the agency's admitted violation with this and many other aspects of the regulations, the court seeks to impose the additional burden on the parents of requiring them to show prejudice. This line of thinking fails to give meaning to the purpose of the regulations, i.e, to ensure a fully informed, free and voluntary process.

This is not unlike the issues involved in a criminal context wherein an accused confesses, waiving the

constitutional right to remain silent or the right to counsel. It is without question that if it were determined that the accused had not been fully and properly informed of all of his constitutional rights prior to confessing, the confession would be deemed coerced for Constitutional purposes and the statements suppressed from evidence. Such an accused would not first be required to show that he was unaware of his right to remain silent or his right to counsel in order to deem the state action invalid. (Miranda v. Arizona (1966) 384 U.S. 432, 86 S.Ct. 1602, 1612.) On the contrary, once it is established that one, where protected interests are waived, was not first provided the lawfully prescribed procedural safeguards and advisement of rights mandated to ensure meaningful due

process, the action taken is deemed invalid.

b. Alternative Plans - Section 34134(a)(3)

This provision requires the agency to provide "all" available information regarding alternative plans for the child, with a complete description of each alternative, including keeping the child, placement with extended family, and/or foster care and reunification services. The purpose of this provision is to ensure that the parents are advised of all options and alternatives to adoption when making this profound decision. The Court of Appeals again found that petitioners failed to prove prejudice as a result of any failure on the part of the agency to provide petitioners with this information, and rendered the violation harmless. This

position continues to overlook the basic premise, however, that when a state acting agency deprives a citizen of a fundamental right, or seeks to obtain a waiver of such a fundamental right, the procedure through which the right is terminated or waived must ensure that the waiver or termination is fully informed, free and voluntary. The burden is not on petitioners to show prejudice, but rather on defendants to establish compliance, or in the alternative, to show that their failure to comply with the law was not prejudicial.

c. Resources - Section 35134 (a) (4)

This provision of the regulations requires that the agency "shall" inform the parent of "at least" the following resources and make a referral when appropriate: financial resources,

employment resources, educational resources, child care resources, housing resources, and health services resources.

The Court of Appeals concedes that defendants violated these regulations, but again held that the violations were harmless because petitioners failed to show prejudice. As is set forth above, the court is in error when it seeks to impose such additional burden on parents in relation to the termination of their parental rights. When a state actor violates the exclusive procedure through which it is empowered to terminate constitutionally protected parental rights, there is simply no legal basis upon which the state may additionally require a parent to demonstrate prejudice as a result of having been deprived of mandated process.

d. Counseling Regarding Decision to Relinquish - Section 35134 (a) (5)

This provision of the regulation requires the agency to provide counseling services "as needed" to assist the parent with his or her feelings regarding the child and the long-range implications of relinquishing a child for adoption. The Court of Appeals deemed this regulation discretionary and again held that the Statement of Understanding adequately confers the counseling required by this regulation. As is set forth above, this cannot be correct. No where within the body of the regulations does it state that the agency may provide no counseling if it so chooses, or that it may satisfy the requirement of counseling by giving the parent a multi-page, finely printed single spaced form to read.

e. Independent Adoption - Section 35134 (a) (6)

This provision requires the agency to advise and inform a parent of the alternative option of independent adoption, as opposed to agency adoption. This is significant because in agency adoption, a relinquishment becomes final and the parent's rights are terminated as soon as the document is filed with the state Department of Social Services, or as quickly as within twenty-four hours. In an independent adoption on the other hand, a parent typically has a minimum of six months before the process becomes final and has, therefore, a significantly longer period of time within which to contemplate the decision. Such a significant distinction in time is particularly important in relation to decisions relating to the termination of

parental rights. Unless a parent is informed and advised of the option of independent adoption, however, and the distinctions between independent and agency adoption, the significance between the two options is meaningless and the parent is deprived of the important right to choose between two very different forms of action, each with very different consequences. In this case, all testimony at trial, including that of defendants themselves, established that petitioners were <u>never</u> informed of this option nor the distinctions, nor the implications. Moreover, insofar as the Court of Appeals again found a failure to show prejudice, it fails to recognize hat prejudice is in fact, apparent based on the fact that petitioners first sought to revoke or rescind the relinquishments within the six month period which would

apply to an independent adoption (which is also when they were first informed of such rights.)

3. Section 35135 - Assurance of Counseling:

This regulation requires that prior to obtaining a relinquishment, the agency must assure that the parents have been adequately counseled in the manner specified by the regulations and that the parents freely choose relinquishment after being so counseled. The trial record clearly reflects that as to petitioner Matt Darrah, the father of the child, the adoption worker spent at a maximum, no more than one hour, total, with Matt prior to obtaining his relinquishment, and at no point during that single hour was Matt ever alone with, counseled by, or personally spoken with by the adoption worker. Petitioner

Lea Darrah fared only slightly better in that she spent a maximum of two single hours, total, with the adoption worker prior to the relinquishment. Testimony at trial established that during those two hours, Lea was not counseled in the manner required by law, nor provided with information and counseling regarding the rights, alternatives and options available to her as required by law. [Appendix 5.]

4. **Section 35141 - Effective Date**:

This regulation requires an agency to advise parents that a relinquishment can either be held for a specified or agreed upon period of time, or can be filed and become final immediately. Once again, the difference between the two periods of time is uniquely significant in relation to the termination of parental rights. Again,

however, the significance is lost if the parent is not advised of the important and very different options. All parties to these proceedings testified at trial that petitioners were never told about these rights or options by the agency before it obtained the relinquishments.

5. Section 35151, 35153 - Copies of Documents:

This regulation requires that upon obtaining the relinquishment forms from the parents, the agency must give the parent copies of the completed document [(§35151 (a) (3) (D)]. All parties testified at trial that this regulation was not complied with. It is important not to underestimate the significance of the requirements of this provision. Relinquishing a child is without question a painful and difficult process. The importance of providing parents with

copies of signed documents cannot be overstated in that it is only through providing the signed forms that a parent is given an opportunity to go home, review the documents privately and carefully, thereby assuring a meaningful opportunity to perceive and comprehend the consequences of what has been signed. This necessarily provides a parent with what may be a final opportunity to contact the agency before the documents are filed with DSS and exercise the option of revocation. Neither Matt nor Lea was provided with copies of the relinquishments or other signed documents until four months later, after retaining an attorney who then demanded copies on their behalf.

Section 35153 (a) (6) requires the agency to send a parent a copy of the filed relinquishment form after it has

been filed with the Department of Social Services. The significance of this is similar to that discussed above, in that by so providing parents with a copy of the documents after filing provides the final opportunity to review and consider what has been done and to exercise their one remaining option to rescind. Again, neither Matt nor Lea was provided with a copy of the filed documents until four months later when they retained an attorney who demanded copies in their behalf.

6. **Section 35134 (a) (8) - Rescission**:

This regulation requires that parents be advised of their right to revoke or rescind a relinquishment. At no time were petitioners ever advised that they had the right to either revoke or rescind their relinquishments, the difference between the two, or the

relevant procedure. On the contrary, when petitioners questioned the adoption worker regarding such rights, they were told that the relinquishments were "irrevocable," (which was not true) and that they had no rights (which was also untrue.) The adoption worker admitted making these statements to petitioners at trial, thereby misinforming them as to the sole remaining rights which then existed -- rescission and revocation.

7. **Section 35169 -- Rescission Procedures**

This regulation sets forth the procedures the agency must follow when it receives a request from a parent for rescission of a relinquishment. The agency failed to comply with any aspect of this regulation, a finding which was specifically acknowledged by the trial court when it stated "...the review by

Raymond Cheroske (agency director) was insufficient by any reasonable standard...." [Appendix 4, pp. 2-3, L: 27-1.] As to the failure of the agency to provide petitioners with the administrative relief mandated by the regulations, the Court of Appeals concluded that insofar as the agency's violation in this regard occurred <u>after</u> it obtained the relinquishments from petitioners, its failure to provide administrative relief was not relevant to the validity of the relinquishments. The failure of the agency to provide administrative relief was, however, very relevant to the due process to which petitioners were entitled, and very relevant to whether or not they were deprived of their sole remaining rights in relation to their child. It is indicative of the agency's continuous

free-wheeling lack of compliance and disregard for the regulations, which are specifically intended to prevent precisely what petitioners claim occurred here.

7. Civil Code Section 222.26 - Medical History :

Defendants failed to comply with what was then Civil Code Section 222.26, which required agencies to obtain medical and family histories from relinquishing parents. Once again defendants failed to comply and obtained virtually no family or medical history with regard to the child. This omission is made even more blatant upon learning that the medical information not obtained by the agency includes family histories of cancer, heart disease, asthma and scoliosis. What it tends once again to reflect is the hasty, unscrupulous, non-compliant

manner in which the agency sought to obtain relinquishments from petitioners.

In summary, all of the above regulations were violated by the agency, and the cumulative impact of the agencies violations inherently resulted in prejudice to petitioners. It is undisputed that petitioners were not fully informed of their rights, options, alternatives and available resources. Petitioners believe and assert that had the regulations been complied with by the agency, had the agency merely conducted itself in the manner contemplated and required by the law, that they would never have signed the relinquishments. Had they been fully and properly counseled as required by law, had they been provided with the various rights, options and resources contemplated by the regulations, this case would not be

brought before the court. Instead, because of the failure of the agency to merely provide petitioners with the procedural protections and safeguards mandated by law, they have spent the past four years pursuing every legal means available to reverse and undo what was improperly and unlawfully done.

Despite the numerous agency violations reflected in the records of trial court proceedings, [Appendix 5,] the Court of Appeals' decision concluded that the agency (1) merely failed to discuss the option of placing the baby with extended family members, (2) failed to discuss educational or employment resources, (3) failed to give petitioners copies of the executed documents, and (4) failed to obtain medical history. The court also concluded that the defendants failed to provide the administrative

relief required when a parent seeks to revoke or rescind, but concluded that the agency's failure in that regard did not impact the validity of the relinquishments, since it occurred after the relinquishments were obtained.

Even if one were to accept the Court of Appeals' interpretation of the record, however, a critical issue remains to be answered by this court: Will public policy and the principals of due process tolerate the termination of constitutionally protected parental rights to be secured by a state agency in a manner that fails to comply with the regulatory process mandated by the states regulations?

If the answer to this question is in the affirmative, a dangerous precedent is established for the future of adoptions in this country -- a precedent which

poses grave consequences to the integrity of the parent-child relationship and serves to vitiate both the law and spirit of the Constitution.

REASONS WHY PETITION SHOULD BE GRANTED

I. The Due Process Clause of the United States Constitution requires that state regulated adoption agencies comply with mandated state regulations when they act to terminate parental rights by way of relinquishment.

The Fourteenth Amendment provides in relevant part: "...nor shall any state deprive any person of life, liberty, or property, without due process of law...."

While generally "only those actions that may fairly be attributable to the state...are subject to Due Process protections" (Coleman v. Dept. of Personnel Admin. (1991) 52 C.3d 1102, 1112), private conduct may become so entwined with governmental action that it too becomes subject to the due process

guarantees of the Constitution. (Adams v. Dept. of Motor Vehicles (1974) 11 C.3d 146, 152.)

Here, defendant Children's Home Society, a private adoption agency, has been held to be sufficiently entwined with state governmental action so that its actions are subject to the due process guarantees of the Constitution. (Ct.App. Opinion, pp. 42-43.) Similarly, in Scott v. Family Ministries (1976) 65 C.A.3d 492, the California Court of Appeals also held that the conduct of a state licensed private adoption agency was so entangled with state conduct and authority that it was deemed a state actor for purposes of constitutional issues. (Id. at 506-507.)

As was acknowledged by the California Court of Appeal, [Opinion, page 43] both state and federal courts

have long held that the parent-child relationship is deemed an essential human relationship, fundamental in nature, and among the most cherished and protected of all civil rights. [Stanley v. Illinois (1972) 405 U.S. 645, 651; Meyer v. Nebraska (1923) 262 U.S. 390, 399; Skinner v. Oklahoma (1942) 316 U.S. 535; May v. Anderson (1953) 345 U.S. 528, 533; Prince v. Massachusetts (1965) 381 U.S. 479, 496; Michelle W. v. Ronald W. (1985) 39 Cal.3d 354, 357; In re David C. (1984) 152 Cal.App.3d 1189, 1208; In re Robert D. (1984) 151 Cal.App.3d 391.] Parents have the right to be protected from unwarranted state intrusion in the parent-child relationship. When conduct which is regulated by the state and carried out under color of state delegated authority results in the termination of the protected parent-child

relationship, concepts of due process necessarily come into play. (Santosky v. Kramer (1982) 455 U.S. 745, 753-754.)

The fundamental issue presented in this case is whether the Due Process Clause requires agency compliance with state mandated regulations when an agency obtains a relinquishment of parental rights.

Petitioners contend that the Due Process Clause of the United States Constitution requires state regulated adoption agencies to carefully and cautiously comply with state regulations when terminating parental rights.

It is generally recognized that the Due Process Clause, for all of its consequence, has never been and perhaps never can be precisely defined. (Lassiter v. Department of Social Services (1981) 452 U.S. 18.) Unlike other legal

concepts, due process "is not a technical conception unrelated to time, place and circumstance." (Cafeteria Workers v. McElroy (1961) 367 U.S. 886.) "Rather, the phrase [due process] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." (Lassiter v. Department of Social Services, supra, (1981) 452 U.S. 18, 68 L.Ed.2d 640, 648.)

In deciding what is required by due process, there are typically three elements to be identified and considered: the private interests at stake; the

government's interest; and the risk that the procedures used will result in erroneous decisions. (Matthews v. Eldridge (1976) 424 U.S. 319, 335.)

In this case, the private interests at stake include the following:

(1) The right of parents to the care and custody of their child;

(2) The right of parents to be fully and completely informed and advised regarding all of the state identified rights, options, alternatives and resources, prior to relinquishing their child for adoption;

(3) The right of parents to be free from undue influence, over-persuasion and potentially unscrupulous conduct on the part of adoption workers.

The decisions of the Supreme Court of the United States have made it indisputably clear that "a parent's

desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." (Lassiter v. Department of Social Services, supra at 650; citing Stanley v. Illinois (1972) 405 U.S. 645, 651.) The Supreme Court in Santosky v. Kramer, supra, 455 U.S. 745, (citing Goldberg v. Kelly, (1970) 397 U.S. 254, 262, and Lassiter v. Department of Social Services, supra) stated:

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' When the state initiates a parental rights termination proceeding, it seeks not merely to infringe upon that fundamental liberty, but to end it. If the state prevails, it will have worked a unique kind of deprivation...A parent's interest in the accuracy and justice of the decision...is therefore a commanding one."

Thus, one must conclude that a parent's interest in making a fully informed, free and voluntary decision regarding an irrevocable decision to terminate parental rights weighs very heavily in relation to the first element of the three prong analysis.

The second factor to be considered in a due process analysis is the state's interest in the matter. Here, the state can only have an interest in ensuring that relinquishments are procured in a fully informed, free and voluntary manner, after careful and cautious contemplation by the parents. The state's interests in this regard are intended to further ensure that once a parent relinquishes a child in a legally appropriate manner, the relinquishment will be final and binding, allowing the subsequent adoption proceeding to

likewise be final and binding. In this regard, the state's interest is fully consistent with the interests of the parents.

The state's interest may on the surface appear to diverge somewhat from interests of the parents insofar as the state has an interest in assuring that once obtained, relinquishments are final and binding, "in order to ensure that children will not be forced out of one home and into another at the whims and caprice of emotionally upset and perhaps ill-advised persons." (Hall v. Department of Adoptions (1975) 47 Cal.App.3d 898, 903.) Even expressing the state interest in these terms, however, in no way undermines nor negates the state's interest in first ensuring that a relinquishment upon which it seeks to rely was obtained only in a fully

informed, free and voluntary manner. In this regard the state's interest and the private interests are entirely consistent.

The state's interest can best be achieved and protected in precisely the same manner as a parent's interests: by first requiring adoption agencies to comply with the regulatory process mandated by the regulations, which necessarily ensure that the relinquishments are not taken from "emotional upset and perhaps ill-advised persons" who would be likely to wish to rescind their relinquishment. (Hall v. Department of Adoptions, supra, 47 C.A.3d 898, 903.)

Thus, balancing the second element of the three prong due process analysis, the state has no legitimate interest in adopting a lesser due process standard

than that spelled out by the state's own regulatory process. This is particularly significant insofar as the state does not identify nor provide any alternative form of regulation process.

The third factor to be considered in relation to the three prong analysis is the likelihood that parents may be deprived of their fundamental right to parent their child by a due process standard that is lower than that prescribed by the regulations. Clearly, the regulations were enacted to protect the fundamental rights of parents when making this critical and life-altering decision to waive or relinquish their rights.

The court in Mills vs. Habluetzel (1982) 156 U.S. 91, 101 recognized the enormous pressures wrought on unwed parents such as petitioners here,

following the birth of an "illegitimate" child, as well as the need for the law to acknowledge the vulnerability inherent in such circumstances and to provide protection from potentially unscrupulous agency conduct. "It requires little experience to appreciate the obstacles ...that confront unwed mothers during the child's first year. Financial difficulties caused by childbirth expenses, to a birth-related loss of income, continuing affection for the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child..." are just a few of the difficulties appreciated by this court. The requirements of the regulations properly reflect each and every one of the concerns and obstacles facing young

unwed parents as they contemplate the painful decision of relinquishing a child. For example, the regulations require the agency to counsel the parents in order to ensure that the decision to relinquish is fully informed and considered; the regulations require the agency to counsel the parents regarding their right to an attorney; advise and inform them of any and all available alternative plans; counsel them regarding their feelings of grief and loss to ensure that the parents can cope with their decision; advise them of the right to seek an <u>independent</u> adoption and thereby have more time to make the decision, provide them with information regarding the effective date for filing the relinquishment; provide them with copies of the signed documents for review; and finally advise them regarding

the options of rescission and revocation. These procedures are all important and necessary in order to protect against ill-advised decisions, based on fear, shame, or lack of alternatives. It is precisely because of the circumstances contemplated by the court in Mills, supra -- i.e. the stress surrounding the birth of a child, a young, unwed mother with little or no resources, isolated from the support of family and friends -- that the regulations are absolutely and particularly critical in order to provide meaningful protection against the very harm the regulations seek to prevent. There is no identified, uniform regulatory process available other than the regulations to protect both the relinquishing parents and the children they are about to relinquish from either precipitous, premature, or ill-advised

decisions, or from arbitrary, subjective, overreaching, or unscrupulous agency conduct.

The dispositive question regarding the application of due process to circumstances such as these, is therefore answered affirmatively. When the Court weighs the three elements, (1) the parents' commanding interest in parenting their child, (2) the state's important interest in ensuring that relinquishments are obtained only in a fully informed, free and voluntary manner, so that the resulting decision can be final and binding, and (3) the likelihood that the procedures prescribed will adequately protect the interests of both parents and the state -- it becomes readily apparent that the regulatory process prescribed by the state does in fact set forth the process due a relinquishing parent, and

that the failure of an agency to comply with that process is in violation of a parent's right to due process of law.

II. The issue involved in this case is of the highest importance and the court's decision will have far reaching consequences on relinquishment and adoption practices.

The comprehensive statutory and regulatory scheme of law which governs adoptions and relinquishments under existing law was enacted in direct response to serious legal, social and administrative problems which directly from the essentially unregulated and often unscrupulous adoption practices of years past. Prior to enactment of the comprehensive system of regulation which now exists, allegations of baby-stealing, and baby-marketing were rampant, along with accusations of fraud, coercion, and undue influence on that part of interested agencies or adoption workers.

These allegations did not involve only persons with unlawful motives, but persons whose intentions may have been well-meaning, but whose conduct was overly intrusive in an effort to see that a child received a "good" home, or a "better" home than the parents could offer. Regardless of individual intent, unregulated agency conduct was inherently arbitrary and subjective, and often improperly deprived parents of their fundamental right to the care and custody of their children. Unregulated agency process undeniably results in relinquishments by parents, but such an unregulated process fails to ensure that the resulting relinquishments are free and voluntary.

It is only through an identified and mandated process that the nation can protect its significant interest in

ensuring that parents are provided with due process of law, and that relinquishments are obtained only after consideration of the gravity of the decision, with the knowledge and understanding of all the rights, alternatives and resources legally available.

In this case, the state has identified and mandated an appropriate regulatory process intended to govern the relinquishment process. What is lacking, however, is compliance on the part of the agency and enforcement on the part of the courts. Regardless of how significant the court deems the rights of parents to be, and regardless of how adequately the state seeks to protect those rights through a mandated process, the amount of protection actually provided to a relinquishing parent can be no greater

than the degree of enforcement provided by the courts.

The outcome of a case such as this will serve as a legal barometer to adoption agencies throughout both the state and the country, regarding whether and to what extent agency compliance will be required with the various laws and regulations relating to adoption and relinquishment. There has been tremendous litigation in recent years regarding the legality surrounding adoptions, raising multiple issues regarding what duties agencies owe in order to secure valid relinquishments, to whom such duties are owed, under what circumstances a duty is owed, what level of agency compliance with applicable law is required, what degree of noncompliance, if any, will be tolerated, and to what extent an agency is required

to act in a manner which assures first and foremost that a relinquishment obtained from a parent is fully informed, and freely and voluntarily given.

The existing decision of the Court of Appeals has left a cloud of uncertainty over the standards governing agency practices. A strong directive from this Court is necessary to put the issue to rest with a degree of certainty which is required in order to provide meaningful protection for the interests of all involved in adoption practices. Agencies need to know that they -- like each of us -- are bound by the principals and processes contemplated by the Constitution in order to ensure that fundamental rights are respected and protected. Agencies must know that they can only obtain relinquishments from parents in the cautious manner mandated

by the state regulatory process. Only when an agency provides the process identified and mandated by law may it properly be presumed that the resulting relinquishment is a fully informed, free and voluntary waiver of parents rights.

Insofar as the courts fail to enforce agency compliance with state mandated regulations, agencies will be permitted to act in a relatively unregulated manner, subject to little scrutiny, within a population which is typically uniquely vulnerable. To allow agencies to conduct themselves in such a manner is not a means through which either a parent or the constitution can afford meaningful protection to a parent's fundamental right to the care and custody of their child. Permitting agencies to conduct themselves in an unregulated, unidentified, arbitrary or

subjective manner is not a means through which due process of law can or will be provided. Rather it can be no more than an invitation for ambiguity, oversight, overreaching, and unscrupulous, unlawful conduct -- all of which will be to the irreparable detriment of the very persons the regulations are intended to protect - the parents considering relinquishment and the children who may be relinquished.

The Illinois Supreme Court recently described the significance of the agency compliance with state regulations in very poignant yet meaningful terms:

"Considering the nature and great importance of the adoption of children into the home and family, in comparison with most other transactions of life, it seems amazing to us that so little regard is often paid to the vital necessity of legality. The necessary steps are easy to understand and easy to observe, and only a fair degree of attention at the right time will prevent frustration, disappointment and heartache. The

procedural safeguards are not mere window dressing -- they serve to protect the interests of the parties, the child and the public..." In the Matter of P.E.P., (1991) 407 S.E.2d 505, 511.

The Court of Appeals sought to distinguish the issues considered by the state supreme court In the Matter of P.E.P., supra, but the underlying issues were very similar to those of this case -- whether and to what extent an agency will or will not be required to comply with state mandated process in the relinquishment and termination of parental rights.

The California Court of Appeals has obviously applied a far different standard in response to that question than did the Illinois Supreme Court. It is the contention of petitioners that the lesser standard applied by the Court of Appeals in this case is also very different than that contemplated by this

court in any of the myriad of cases in which issues involving due process in relation to parental rights has been considered. A parent's right to due process cannot and should not be dependent upon which state they happen to reside. The decision in this case leaves unanswered the question of what the law does or does not require, and as such can only result in disparity and variance among agencies and between states, which in turn clears the path for arbitrary, and capricious conduct in relation to the termination of protected rights.

The due process clause mandates compliance with the regulations at issue in this case. Given the volume of the agency violations and minimal costs to the agency associated with compliance, the importance of the parents' interest, together with their uniquely vulnerable

position, their relinquishments cannot be said to be given freely nor voluntarily. Thus the issue before the court is of the highest importance, extremely timely, and will have far-reaching consequences on adoption and relinquishment practices.

CONCLUSION

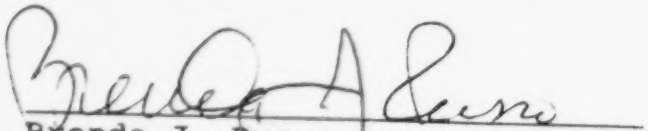
In sum, this case presents a rare opportunity to direct and advise not only lower courts, but also agencies and others in the adoption industry, precisely what procedural safeguards and protections agencies must afford parents in the relinquishment and termination of their parental rights, in order to ensure compliance with due process requirements. It is also an opportunity to consider needed uniformity of process in relation to adoptions nationwide. When the state involves itself in the waiver or termination of protected rights, due

process mandates compliance with such regulations. Here the risk of harm is grave, and the cost of protection is minimal.

DATE: April 28, 1995

Respectfully Submitted,

LAW OFFICES OF RUSSO & SOROCH



Brenda J. Russo
Attorney for Petitioners

IN THE

Court of Appeal of the State of

California

IN AND FOR THE

THIRD APPELLATE DISTRICT

LEA TYLER AND
MATTHEW DARRAH
Plaintiff and
Appellant

vs.

3 Civil C016382
Yolo 69606

CHILDREN'S HOME
SOCIETY OF CALIF.
ET AL.
Defendant and
Respondent

REMITTITUR TO TRIAL COURT CLERK

I, ROBERT L. LISTON, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

Respondents to recover costs on appeal.

WITNESS my hand and the seal of the Court affixed at my office this 9th day of January 1995.

ROBERT L. LISTON, Clerk

By: s/Robert Liston
Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: Trial Court Clerk

By:
Deputy

cc: see Mailing List

IN THE

Court of Appeal of the Sate of

California

IN AND FOR THE

THIRD APPELLATE DISTRICT

MAILING LIST

Re: LEA TYLER AND MATTHEW DARRAH
vs. CHILDREN'S HOME SOCIETY OF
CALIF. ET AL.
3 Civil C016382

Copies of the attached document have been sent to the individuals checked below:

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Third Appellate District No. C016382
S043604

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

LEA TYLER Et Al., Appellants

v.

CHILDREN'S HOME SOCIETY OF CALIFORNIA Et Al., Respondents

Petition for review DENIED.

s/Lucas
Chief Justice

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(YOLO)

LEA TYLER et al., Plaintiffs and Appellants, vs. CHILDREN'S HOME SOCIETY OF CALIFORNIA el al., Defendants and Respondents.	C016382 (Super. Ct. No 69606)

APPEAL from a judgment of the Superior Court of Yolo County. William S. Lebov, Judge. Affirmed.

Stahnke & Russo and Brenda J. Russo for Plaintiffs and Appellants.

Murphy & Jacobs, Timothy P. Murphy, Victoria M. Jacobs and William P. Brodbeck for Defendants and Respondents.

In this action seeking rescission of agreements relinquishing a child for adoption through a licensed private adoption agency, plaintiffs Lea Tyler and Matthew Darrah[1/*] appeal from the trial court's judgment in favor of defendants Children's Home Society of California (CHS), Davis Crisis Pregnancy Center, Inc. (DCPC), Kathy Huntziker, and Dee Heszler. On appeal plaintiffs contend the relinquishments are void due to the failure of adoption agency CHS and its employee Heszler to comply with Department of Social Services (DSS) regulations.

We shall conclude plaintiffs have failed to show prejudice from any regulatory violations. We shall therefore affirm the judgment.[2/]

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* All footnotes set forth at end of document.

FACTS AND PROCEDURAL BACKGROUND[3]

On April 14, 1991, 18-year-old college freshman Tyler gave birth unattended to a premature baby girl in the bathroom of her dormitory at the University of California, Davis, while her roommates slept in adjoining rooms. Tyler's family, friends, and roommates were unaware of the pregnancy or birth.

The alleged birth father,[4] Darrah, was aware of the pregnancy. He and Tyler had become involved when they were both honor students at the same high school. At the time of the baby's birth Darrah was a freshman at the University of California, San Diego.

On April 15, 1991, the day after the baby's birth, Tyler telephoned DCPC, which advertised itself as a Christian organization offering free services to pregnant women. Tyler expressed to DCPC

volunteer Huntziker an interest in placing a baby for adoption.

Also on April 15th, Tyler traveled with the baby to San Diego, where they spent five days at Darrah's apartment while Tyler and Darrah discussed their situation.

On April 21st, Tyler and the baby returned to Davis and met with Huntziker and Heszler, a field representative for CHS. Heszler had been contacted by Huntziker, who related that Tyler was interested in immediate foster care and placement of the baby for adoption.

At the meeting on April 21st, Tyler stated she and Darrah decided after much discussion to place the baby for adoption. Tyler said she could not tell her parents about the birth. Her parents did not even know about the pregnancy or that she was sexually

active. They were a traditional family. Tyler was a role model for her two younger sisters. She could not disappoint her parents. Tyler was consistent throughout the interview that she and Darrah had decided on adoption as their choice. Tyler wished to proceed quickly in order to allow the baby to bond with adoptive parents.

Heszler encouraged Tyler to reconsider the option of telling her parents about the baby and offered to help Tyler do so. Tyler declined. When asked what would happen if her parents found out later, Tyler said she expected Heszler and Huntziker to maintain confidentiality, and she did not see any way her parents would find out.

Heszler brought up the possibility of Tyler raising the child by herself, but Tyler insisted she would not do

anything that would mean her parents would find out about the baby.

Heszler and Tyler discussed the possibility of Tyler and Darrah getting married and raising the child together. Tyler said she and Darrah had talked about that at great length but decided it was not possible. They were both college freshmen who intended to complete their education, and they were not in a position to give the baby what they wished her to have.

At Tyler's request, the baby was placed in foster care.

Heszler gave Tyler blank copies of a "Statement of Understanding" and relinquishment forms to take home, advising that they were not to be signed but Tyler should review them because she would be signing similar forms if she decided to proceed with adoption.

The Statement of Understanding begins as follows: "Relinquishing a child means permanently giving the child to the adoption agency so the agency can choose other parents to adopt the child. You permanently give up the child to the adoption agency by signing this Statement of Understanding and the Relinquishment document. You will no longer have any rights as a parent to your child once these documents have been filed with the State Department of Social Services, Adoptions Branch." The Statement of Understand contains specific information material to the decision to relinquish, as we discuss below.

On April 25th, Heszler mailed to Darrah copies of relevant forms, including a Statement of Understanding for "alleged fathers,"[5/] the

relinquishment form, and a memorandum telling him the documents were for his review and inviting him to call with any questions.

On April 27th, Tyler told Heszler that Tyler and Darrah had chosen a prospective adoptive family from an album of photographs and resumes previously provided by Heszler.

On Wednesday, May 1, 1991, plaintiffs met at Central Park in Davis with Heszler and the prospective adoptive parents. This first meeting, which was somewhat strained, lasted about 50 minutes. This was Heszler's first meeting with Darrah. Darrah said he loved the baby but there was no way he and Tyler could provide for her because they were both college freshmen who needed to complete their education.

After the second meeting with the

prospective adoptive parents on May 3rd, Tyler reported to Heszler that she and Darrah were certain they wanted to place the baby with the couple. Tyler said she and Darrah wanted to proceed with the relinquishment the following day, Saturday, because Darrah would be returning to San Diego on Sunday. Tyler rejected Heszler's suggestion that plaintiffs give themselves one more day to think about it.

On Saturday, May 4th, plaintiffs met at the DCPC office with Heszler, Huntziker, the prospective adoptive family, the foster parents, and the baby. Tyler presented flowers to Huntziker, the foster mother, and the prospective adoptive mother.

Heszler took plaintiffs into a private room and told them they would be asked to answer the following question

in front of the witnesses to the execution of the relinquishment documents: (1) "[H]ave you read this relinquishment and are you aware of what you are signing"; (2) "are you aware that when this signed relinquishment is filed with the State Department of Social Services by [CHS] all your rights to the custody, service, and earnings of this child and any responsibility for the care and support of this child will be terminated and that the child cannot be reclaimed by you"; and (3) "are you signing this relinquishment of your own free will." Plaintiffs listened and had no questions.

Heszler then called in the foster parents to witness execution of the documents. Heszler asked the questions she had previewed with plaintiffs, and plaintiffs responded affirmatively.

Heszler asked if plaintiffs had read the Statement of Understanding. They said they had. Heszler had plaintiffs reread the Statement of Understanding to themselves and initial the boxes next to each paragraph to reflect their understanding of the information contained in each paragraph. The statements of Understanding called for the parent to choose between immediate filing of the relinquishment or a hold of up to 30 days. Heszler told plaintiffs they had this option. Plaintiffs chose immediate filing. Heszler told plaintiffs they had one full working day--until 5 p.m. Monday--to change their mind and revoke the relinquishments. Plaintiffs signed the forms. The process took 15 or 20 minutes. Plaintiffs were tearful, as they had been at times throughout the

process, but Heszler considered that to be normal emotion at relinquishing a baby. Neither Heszler nor the foster parents observed any indication that plaintiffs felt coerced or pressured into signing.

The child was turned over to the prospective adoptive parents.

The relinquishment forms were filed with DSS on Tuesday, May 7, 1991

On May 30, 1991, Tyler gave the prospective adoptive mother a Mother's Day card, signed by Tyler and Darrah, on which Tyler had handwritten: "Thank you so much for giving Michelle exactly what we want for her, loving parents. Happy Mother's Day!"

Several months later, in mid-September 1991, Tyler told her parents about the baby. Darrah also told his parents in the fall of 1991. Tyler's

parents told her there must be something she could do to get the baby back. On September 14, 1991, Tyler telephoned Heszler and said she (Tyler) had made a mistake and wanted to get the baby back. Heszler said it was too late to revoke but sent forms to request rescission. Tyler submitted a formal request for rescission, which was denied by CHS.

On October 29, 1991, plaintiffs filed this contract action for (1) rescission of the relinquishment agreements, on the grounds of fraud, coercion and undue influence, (2) intentional infliction of emotional distress, and (3) punitive damages.

The trial court ordered a stay of the pending adoption proceedings.[6/]

At trial, in addition to their accusations of coercion and intimidation, plaintiffs asserted

Heszler and CHS violated DSS regulations governing relinquishment of children for adoption by failing to (1) give plaintiffs full counseling, (2) give plaintiffs copies of the signed and filed forms, and (3) obtain a full medical history from Darrah. Heszler admitted noncompliance in that she did not discuss the option of placing the baby with extended family members, did not discuss educational or employment resources, did not give plaintiffs copies of the executed documents, and did not obtain Darrah's medical history before the relinquishments were signed. We discuss the specific regulations, *post*.

Following a three week bench trial, the trial court found in favor of defendants. The court issued a written 11-page "OPINION AND RULING,"[7] finding

that Heszler is an "ethical, principled, and experienced professional,"[8] that plaintiffs' relinquishments for adoption were not procured by "fraud, coercion or undue influence," and that the relinquishments for adoption were "voluntarily, intelligently and knowingly" given by both plaintiffs, who "are intelligent and strong minded." The trial court believed plaintiffs loved the baby but made the difficult decision to relinquish her due to their difficult personal circumstances. "The Court believes that the Plaintiffs came to believe that they made a mistake, that they decided finally to tell their parents and when they received (perhaps unexpectedly) support from their parents they decided to seek to regain their child."

The trial court concluded the

regulatory violations were of "limited relevance" because "minor deviation ... are insignificant, absent fraud or wrongful conduct...."

The court entered judgment on favor of defendants. Plaintiffs appeal.

DISCUSSION

Plaintiffs contend Heszler and CHS failed to comply with mandatory DSS regulations applicable to private agency adoptions, and the failure of an adoption agency to comply with mandatory state regulations in obtaining relinquishments of parental rights renders the relinquishments void. Plaintiffs' position is not entirely clear. They appear to advocate automatic rescission for *any* regulatory violation, yet they also appear to agree with the notion that insignificant violations need not result in

rescission.

We stress that, given the procedural posture of this case, this appeal does not present issues of deliberate misconduct by defendants. Rather, the issue here is at most negligent omission of regulatory requirements.

We will conclude noncompliance with the regulations does not automatically vitiate a relinquishment, However, noncompliance will constitute a ground for rescission of a relinquishment, regardless of the lack of fraudulent intent, if the noncompliance rises to the level of constructive fraud, i.e., if the violation causes prejudice to the relinquishing parents by affecting their decision to relinquish. Here, however, plaintiffs fail to show constructive fraud.

I. The Relinquishment Process

At the time plaintiffs signed their relinquishments, the process was governed by former Civil Code, section 221 et seq.[2/] Former Civil Code section 224m (Stats. 1980, ch. 1229, § 1, p. 4152, repealed by Stats. 1990, ch. 1363, § 2, operative July 1, 1991), provided in part: "The father or mother may relinquish a child to a licensed adoption agency for adoption by a written statement signed before two subscribing witnesses and acknowledged before an authorized official of an organization licensed by the State Department of Social Services to find homes for children and place children in homes for adoption....[¶] The filing of the relinquishment with the department shall terminate all parental rights and responsibilities with regard to the

child."

The relinquishment process was and is subject to regulations (Cal. Code Regs., tit. 22, § 35128 et seq.) adopted by DSS pursuant to legislative authority. (Welf. & Inst. Code, § 10553;[10] see now, Family Code, § 8621,[11] operative Jan. 1, 1995 [department shall adopt regulations].)

The effect of a relinquishment of a child by a birth parent is to allow adoption of the child without further consent of the birth parent. (Fam. Code, § 8606.)

Once a relinquishment is filed with DSS, it is final and cannot be rescinded except under narrow circumstances. By statute: "...Upon filing with the department, the relinquishment is final and may be rescinded only by the mutual consent of the adoption agency and the

parent or parents relinquishing the child...." (Former Civil Code section 224m, repealed by Stats. 1990, ch. 1363, § 2, operative July 1, 1991.)[12/] Similarly, the regulations provide: "A relinquishment which has been filed with the department shall be rescinded only as specified at Civil Code Section 222.10." (§ 35167.) Civil Code section 222.10, which was repealed and replaced by Family Code section 8700 (Stats. 1993, ch. 219, § 10), provided at the time in question: "...Upon filing with the department, the relinquishment is final and may be rescinded only by the mutual consent of the adoption agency and the birth parent or parents relinquishing the child.... " (Stats. 1990, ch. 1363, § 3.)

Nevertheless, California courts have long held that a birth parent may

bring an action in equity to set aside a relinquishment for cause, such as fraud or undue influence. (*In re Cheryl E.* (1984) 161 Cal.App.3d 587, 598-602 [substantial evidence supported trial court's finding of undue influence where adoption worker misrepresented duration of revocation rights and told plaintiff if she did not sign relinquishment the child might be given to plaintiff's estranged husband]; *Brooks* v. *Los Angeles County Bureau of Adoptions* (1963) 218 Cal.App.2d 732 [statute did not negate independent rule of equity allowing rescission for cause].)

However, the contract of relinquishment cannot be rescinded when it appears that consent would have been given and the contract entered into notwithstanding the fraud or undue influence (*In re Cheryl E., supra,* 161

Cal.App.3d at p. 600 [trial court implicitly found parent would not have relinquished child but for misrepresentations of adoption worker].) The granting or withholding of equitable relief is a matter within the discretion of the trial court. (*Fairchild* v. *Raines* (1944) 24 Cal.2d 818, 826.)

"Relinquishments, once executed, must be relied upon in order to insure that children will not be forced out of one home and into another at the whims and caprice of emotionally upset and perhaps ill-advised persons. The state has expressed a strong policy in the necessity for giving effect to relinquishments, for to do otherwise would 'open the door to practices which could conceivably discourage adopting parents from opening their hearts and homes to unwanted children....'

[Citation.]" (*Hall* v. *Department of Adoptions* (1975) 47 Cal.App.3d 898, 903 [coercion by child's father would not constitute ground for child's mother to rescind relinquishment unless adoption worker knew or should have known mother's consent was not freely and voluntarily given]; see also, *Adoption of Graham* (1962) 58 Cal.2d 899 [policy of state to maintain integrity of relinquishments]; *Adoption of Barnett* (1960) 54 Cal.2d 370, 377.) Adoption requirements "are to be liberally construed in order to effect the object of the adoption statutes in promoting the welfare of children, bereft of the benefits of the home and care of their real parents...." (*San Diego County Dept. of Pub. Welfare* v. *Superior Court* (1972) 7 Cal.3d 1, 16, internal quotes omitted.)

II. Asserted Regulatory Violations

Plaintiffs assert defendants violated various regulations. As to some of the regulations, the record shows the evidence was conflicting as to whether there was compliance. Where there is a conflict, we will infer findings in favor of the judgment, because no statement of decision was requested. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

A. Section 35129--Face-To-Face Interview[13]/

Darrah complains that as to him defendants failed to comply with section 35129, which provides in part: "The agency shall provide a minimum of two face-to-face interviews with parents who are considering relinquishment and who reside in California. [¶] (1) The required interviews shall be provided

over a period of two or more days.... [¶] (3) During the interview the agency shall explain to the parent the purpose of the agency and the services it provides."

Heszler testified she complied with this regulation by meeting with Darrah twice--on May 1st at the park and on May 4th when the relinquishments were signed.

Darrah suggests the May 4th meeting does not count because both interviews must occur before the meeting to sign the documents. However, nothing in the regulation so requires.

Darrah also contends the May 1st meeting does not count, because it lasted only 50 minutes, was held in a public park, and the prospective adoptive parents were present the whole time. Darrah thus challenges the

quality of a meeting as an "interview." However, the regulation does not specify requirements as to location or duration of the meeting, nor does the regulation restrict who else may be present.

Plaintiffs fail to show any violation of section 35129.

B. Sections 35133 and 35134--Counseling

Plaintiffs complain they did not receive counseling required by section 35133 and 35134.

Section 35133 provides: "Prior to accepting the parent's relinquishment of the child for adoption, the agency shall provide counseling as appropriate to the category of parents as described at Section 35134 who reside in California."

Section 35134 lists specific information that must be conveyed to parents, with certain requirements for

mothers and "presumed fathers" (§ 35134, subd. (a)), and different requirements for "alleged fathers" (§ 35134, subd. (e)).

Thus, the requirements differ for Tyler (as the mother) and Darrah (as the alleged father). On appeal, plaintiffs improperly ignore the distinction between the two subdivisions, inasmuch as they do not challenge defendants' characterization of Darrah as an alleged father. (Fn. 5, *ante*.)

We turn now to plaintiffs' specific complaints regarding the counseling requirements.

1. Legal Counsel

First, plaintiffs claim defendants failed to comply with section 35134, which provides that "the agency shall... [¶]...[i]nform the parent that he/she has the right to seek legal counsel to

assist him/her in the relinquishment process...[¶]...When appropriate the agency shall make referral to [legal resources]." (§ 35134, subd. (a)(2) [mother], subd. (e)(2) [alleged father].) Heszler admitted she did not verbally convey this information to plaintiffs, but is was contained in the Statements of Understanding.

Thus, the Statements of Understanding both contained the following statement: "I understand I have the right to look for a lawyer to help me in the relinquishment process and the adoption agency can refer me to a public legal help in my community." Plaintiffs each initialed the box next to that statement.

The regulations require that parents be provided with specific information in written form. (§ 35147.)

Plaintiffs argue section 35134 must therefore require *verbal* counseling, because otherwise section 35137 would be superfluous. Merely handing someone a printed form, argue plaintiffs, cannot satisfy the purpose the regulations were designed to serve. However, this is not a case where a printed form was substituted for all human interaction. Assuming for the sake of argument that section 35134 requires verbal counseling, the omission of the verbal message regarding legal counsel was rendered harmless by the written Statement of Understanding. The right to legal counsel was stated in plain language. Plaintiffs are intelligent and strong-minded, as found by the trial court.

Plaintiffs do not show they were unaware of the right to legal counsel or

were prejudiced by the lack of verbal communication of this matter.

To the extent plaintiffs suggests defendants were required to make an actual referral to legal services, the regulation requires only a referral "[w]hen appropriate." (§ 35134, subd. (a)(2)(A) [mother]; subd. (e)(2)(A) [alleged father].) Plaintiffs fail to show the absence of a referral in this case constitutes a violation of the regulation.

2. Alternative Plans

Second, plaintiffs contend defendants violated section 35134, subdivision (a)(3), which requires the agency to "[p]rovide all available information regarding alternative plans for the child, with a complete description of each alternative, including keeping the child, placement

with extended family members, and/or foster care and reunification services."

Plaintiffs incorrectly assert "*None* of this was done in this case." (Original italics.)

However, Heszler testified she did orally provide this information to Tyler, with the exception of (1) the extended family alternative, and (2) reunification services, which Heszler testified applies only in dependency cases. Thus, Heszler talked to Tyler about the possibility of marrying Darrah and raising the child, but Tyler said she and Darrah had discussed and rejected that option. Heszler talked to Tyler about getting help from Tyler's parents, but Tyler was adamant that she did not want them to know about the baby and did not want Heszler to intercede in her behalf with her parents. Heszler

talked to Tyler about raising the child on her own with the help of Aid to Families with Dependent Children (AFDC), but Tyler was not interested in AFDC and would not consider any option that might result in her parents finding out about the baby. Heszler talked to Tyler about foster care as a temporary resource, which in fact Tyler used.

Heszler admitted she did not talk to Tyler about placing the baby with extended family members. However, under the circumstances of this case, this deficiency was not prejudicial, because Tyler was adamant that she would not choose any option that would lead to her parents finding out about the baby. The trial court found Tyler did not want her parents to find out and intentionally kept the baby a secret. Tyler cites nothing in the record to demonstrate she

would have placed the baby with extended family members had defendants counseled her on this option.

As to Darrah, the regulation addressing alleged fathers merely requires the agency to "[d]iscuss the adoption plan for the child and determine if he wants to relinquish the child, assume parental responsibility for the child, place the child with extended family members, place the child in foster care and/or receive reunification services." (§ 35134,subd. (e)(3).) Heszler discussed the adoption plan with Darrah and determined he wanted to relinquish the child. Assuming the regulation contemplates that the adoption worker will discuss the other options with the alleged father, no prejudice appears in this case, because the trial court found

Darrah did not want his parents to find out about the baby. The other options would result in his parents finding out.

No prejudice appears.

3. Resources

Third, plaintiffs contend defendants failed to comply with section 35134, subdivision (a)(4), which provides that the agency shall "[i]nform the parent of at least the following resources and make a referral when appropriate: [] Financial resources, [] Employment resources, [] Education resources, [] Child care resources, [] Housing resources, [and] Health service resources."

Heszler testified she talked to Tyler about the availability of AFDC, but Tyler was not interested. Heszler did not discuss employment resources because they did not seem applicable

since Tyler stated her wish to continue as a student. Heszler did not talk about student loans or university housing. As to housing resources, Heszler talked to Tyler about getting an AFDC grant and moving off campus, which Tyler rejected. As to health services. Heszler provided no services but was aware Tyler was sent to a doctor, per arrangements made by Huntziker.

Thus, defendants failed fully to comply with this regulation. However, plaintiffs fail to show prejudice. They do not cite anything in the record showing they would have decided against relinquishment had the omitted resources been explored.

As to Darrah, the regulations regarding alleged fathers require that the agency "[d]iscuss the financial, health, and social service resources

available if he wishes to consider assuming parental responsibility for the child." (§ 35134, subd. (e)(4).) Here, the trial court disbelieved that Darrah ever wished to consider assuming parental responsibility for the child.

No prejudice appears.

4. Counseling Regarding Feelings

Fourth, plaintiffs contend defendants failed to comply with section 35134, subdivision (a)(5), which requires the agency to "[p]rovide counseling services as needed to assist the parent with his/her feelings regarding the child and the long-range implications of relinquishing the child for adoption." The same requirement applies to alleged fathers. (§ 35134, subd. (e)(6).)

However, this regulation on its face confers discretion on the adoption

worker to determine what counseling is needed. Heszler testified she did comply with this regulation by talking to Tyler about her feelings, her grief reaction, the finality of the decision, and the fact that it was the hardest decision to make in life. Heszler did not believe further counseling was required or would benefit Tyler. Tyler fails to demonstrate that Heszler's exercise of discretion constitutes a violation of the regulation. Darrah fails to show he needed counseling or was prejudiced by any lack of counseling regarding his feelings. That plaintiffs cried while signing the relinquishments does not establish prejudice; as Heszler testified, sadness is a normal emotion during a relinquishment.

Moreover, the long-range implications of relinquishment were also

fully set forth in the written Statements of Understanding signed by plaintiffs. Thus, the documents stated plaintiffs' understanding that by relinquishing the child, they would "no longer be responsible for the care of my child," would "no longer have any right to the custody, services or earnings of my child," and after adoption "all inheritance rights from any blood relatives will end unless they have made arrangements...." The documents also told plaintiffs they had five years to seek rescission "if I think I was forced to sign or deliberately not told the truth about giving up my child."

No violation of the regulation is shown.

5. Independent Adoption

Fifth, plaintiffs contend defendants failed to comply with section

35134, subdivision (a)(6), which requires the agency to "[a]dvise the parent of the option of an independent adoption." No similar provision appears under the subdivision addressing alleged fathers. (§ 35134, subd. (e).)

Heszler testified she did not verbally advise Tyler about independent adoption because it was apparent Tyler already knew about it.[14] Additionally, the Statement of Understanding signed by Tyler contains the following provision, with her initials next to it: "6. I understand if I decide not to give up my child to the adoption agency, I can place my child for adoption with parents I find myself and agree only to an adoption of my child by these parents; this is called an Independent Adoption." We note Darrah's Statement of Understanding contained a similar

statement, with the qualification that he would first have to prove paternity in court and obtain physical custody of the child.

Plaintiffs suggest the significance of the distinction between independent adoption and agency adoption was not explained, i.e., that a parent typically has more time to change his or her mind with independent adoption. However, there was no prejudice, because plaintiffs were offered the option of delaying the effectiveness of the relinquishment for up to 30 days but chose not to do so. Thus, the Statements of Understanding said: "I understand I have the following filing choices when I sign this Statement of Understanding and relinquishment document: [¶] A. I may choose to have the adoption agency file my

relinquishment form immediately. If so, I may take it back any time before the close of the next working day after I sign the form; or [¶] B. I may choose to have the adoption agency hold the relinquishment form for up to 30 days so I can think about my decision. I understand my child will to be placed for adoption during any holding period...." At the meeting to sign the documents, Heszler told plaintiffs the option was available. Plaintiffs selected the option: "I want the relinquishment form filed immediately." As reflected by the evidence, it was Tyler's idea to proceed quickly so as to allow the baby to bond with adoptive parents.

Since plaintiffs chose not to avail themselves of a 30-day hold, they cannot show any causal connection between the

asserted noncompliance and their decision to relinquish.

No prejudice appears from violation of section 35133 or 35134.[15]

C. Section 35135--Assurance Of Counseling

Plaintiffs contend defendants failed to comply with section 35135, which provides in part: "(a) Prior to accepting the parent's relinquishment of a child for adoption, the agency shall determine: [¶] (1) That the parent has chosen the plan of adoption for the child and freely chooses to relinquish the child.... [¶] (4) That the parent, if residing in California, has received required counseling as appropriate to the category of parents commencing with section 35134... "

As we have seen, Heszler testified she determined the required counseling

had been received by plaintiffs. Heszler also testified she determined plaintiffs had chosen the adoption plan and had freely chosen to relinquish the child. Additionally, the foster parents who witnessed execution of the relinquishment documents testified that plaintiffs verbally affirmed they understood the documents and were acting voluntarily, and that plaintiffs appeared to know what they were doing and to be doing it freely. Plaintiffs fail to show a violation of section 35135.

D. Section 35141--Effective Date

Plaintiffs contend defendants failed to comply with section 35141, which provides the "agency representative shall inform all parents: [¶] (1) Of the time frame options for the filing of the signed relinquishment

form with the department. [¶] (A) The parent shall be permitted to request that the signed relinquishment form be filed without a holding period. [¶] (B) The parent shall be permitted to have the signed relinquishment form held for a specified period of up to 30 days before the agency submits it to the department for filing.... "

Plaintiffs erroneously assert this regulation allows an "indefinite" hold. The indefinite hold applies only where there are unresolved questions about custody rights of other parents not involved in the relinquishment. (§ 35141, subd. (a)(2).)

Plaintiffs assert they were never advised of the option to put a hold on the relinquishment. However, although plaintiffs testified to that effect (indeed testified Heszler told them the

hold option was no longer available), Heszler testified she did advise plaintiffs of this option when they met to sign the forms. We presume the trial court believed Heszler's testimony.

Plaintiffs fail to demonstrate a violation.

E. Section 35151--Copy Of Signed Documents

Plaintiffs contend defendants failed to comply with section 35151's provision that upon signing of the forms the agency must "[g]ive the parent a copy of the completed relinquishment document." (§ 35151, subd. (a)(3)(D).) Heszler admitted she inadvertently omitted to give the plaintiffs copies of the signed documents. Plaintiffs did not receive their copies until four months later. Plaintiffs claim this omission was crucial because only by

taking the documents home could plaintiffs have a fair opportunity to review the documents privately and carefully so as to invoke their option to revoke within the 24-hour period.

However, events subsequent to the signing cannot be used to demonstrate that the signing itself was tainted. Moreover, plaintiffs had previously received copies of the documents, which presumably were still in their possession. Finally, the trial court found plaintiffs knew they had more than 24 hours to change their mind, but they chose not to do so.

No prejudice appears.

F. Section 35153--Copy Of Filed Documents

Plaintiffs complain defendants failed to comply with section 35153; subdivision (a)(6), which requires that

the agency "[s]end the parent a copy of the filed relinquishment form," after it is filed with DSS. Heszler admitted this was not done. For the reasons we have already stated with regard to the failure to provide copies of signed documents, no prejudice appears.

G. Section 35169--Rescission Procedures

Plaintiffs contend defendants failed to comply with section 35169, which sets forth procedures the agency must follow when it receives a request for rescission of a relinquishment. However, events which occurred after the signing of the relinquishment cannot be used to demonstrate the signing was not knowing and voluntary.

H. Civil Code Section 222.26--Medical History

Plaintiffs contend defendants

failed to comply with former Civil Code section 222.26,[16] requiring the agency to obtain medical histories from relinquishing parents. The portion of the transcript cited by plaintiffs indicates the agency did not obtain Darrah's medical history. However, the purpose of this requirement is not to protect the relinquishing parents but "to provide the prospective adopting parent with the kinds of information which may reasonably influence their decision whether to adopt the child." (*Adoption of Kay C.* (1991) 228 Cal.App.3d 741, 752.) Thus, noncompliance does not prejudice the relinquishing parents.[17]

To recap, defendants violated the DSS regulations in that they (1) failed to discuss the option of placing the baby with extended family members, (2)

failed to discuss educational or employment resources, (3) failed to give plaintiffs copies of the executed documents, and (4) failed to obtain Darrah's medical history.

The crucial question in this case is whether these regulatory violations warrent rescission of the relinquishments despite the absence of prejudice to plaintiffs. Plaintiffs argue regulatory violations automatically vitiate the relinquishments without regard to prejudice. As will appear, we will reject plaintiffs' position as overbroad but will conclude regulatory violations provide a basis for rescission of relinquishments under the doctrine of constructive fraud if a relinquishing parent is misled to his or her prejudice by the adoption agency's violation of

regulations.

III. Noncompliance With Regulations Does Not Automatically Vitiate Relinquishment

Plaintiffs contend noncompliance with the DSS regulations automatically vitiates the relinquishments under principles of administrative and constitutional law. We will conclude the contentions are without merit.

A. Administrative Law

Neither the statutes nor the regulations provide that noncompliance with the regulations renders a relinquishment void. Nevertheless, plaintiffs argue noncompliance with the regulations automatically invalidates the relinquishments because administrative regulations have the force and effect of law, and an agency's failure to follow the law, i.e., the

administrative regulations, invalidates agency action. We disagree.

"[A] regulation adopted by state administrative agency pursuant to a delegation of rulemaking authority by the Legislature has the force and effect of a statute. [Citations.]" (*Agricultural Labor Relations Bd.* v. *Superior Court* (1976) 16 Cal.3d 392, 401.)

However, the general proposition that regulations have the force of statute does not mean that any departure from the regulations automatically invalidates the action taken.

Thus, "[t]radittionally, the question of whether a public official's[18/] failure to comply with a statutory procedure should have the effect of invalidating a subsequent governmental action has been

characterized as a question of whether the statute should be accorded 'mandatory' or 'directory' effect. If the failure is determined to have an invalidating effect, the statute is said to be mandatory; if the failure is determined not to invalidate subsequent action, the statute is said to be directory.... [I]n evaluating whether a provision is to be accorded mandatory of directory effect, courts look to the purpose of the procedural requirement to determine whether invalidation is necessary to promote the statutory design." (*People* v. *McGee* (1977) 19 Cal.3d 948, 958-959; see also *Morris* v. *County of Marin* (1977) 18 Cal.3d 901, 908; *People* v. *Harner* (1989) 213 Cal.App.3d 1400, 1405-1406.) "Many statutory provisions which are 'mandatory' in the obligatory sense are

accorded only 'directory' effect." (*People* v. *McGee*, supra, 19 Cal.3d at p. 959 [reversing conviction for welfare fraud due to government's failure first to seek restitution, as required by statute].)

"[T]here is no simple, mechanical test for determining whether a provision should be given 'directory' or 'mandatory' effect. 'In order to determine whether a particular statutory provision.. is mandatory or directory, the court, as in all cases of statutory construction and interpretation, must ascertain the legislative intent. In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure

to do the particular act at the required time. [] When the object is to subserve some public purpose, the provision may be held directory or mandatory as will best accomplish that purpose....'" (*Morris* v. *County of Marin supra*, 18 Cal.3d at pp. 909-910, fn. omitted.)

Here, the manifest overall purpose of the regulations is to assure that relinquishments are given voluntarily and knowingly, However, we do not deal in this case with a wholesale disregard of the regulations but rather with partial noncompliance involving details such as failure to (1) discuss the option of placing the child with extended family members, (2) discuss educational and employment resources, (3) give copies of executed documents of plaintiffs, and (4) obtain the father's medical history. Under these

circumstances, automatic invalidation of the relinquishments is not necessary to further the purpose of assuring voluntary and knowing decision-making by the parents. That purpose is served by a rule of substantial compliance, which means "actual compliance in respect to the substance essential to every reasonable objective" of the provisions. (*Stasher* v. *Harger-Haldeman* (1962) 58 Cal.2d 23, 29, italics omitted; *Bayside Auto & Truck Sales, Inc.* v. *Department of Transportation* (1993) 21 Cal.App.4th 561, 568.) As we discuss *post*, the relinquishing parents have an adequate remedy through rescission for constructive fraud if regulatory violations cause an involuntary or unknowing relinquishment.

We cannot agree with plaintiffs that the integrity of the adoption

process compels strict adherence to the regulations to the extent that nonprejudicial violations would vitiate relinquishments. In *Adoption of Barnett, supra,* 54 Cal.2d 370, a county bureau of adoptions sought to vacate an adoption by a single parent, who had been married at the time of the natural mother's formal consent to adoption but who was subsequently divorced before the adoption was granted by the court. The natural mother had given *informal* consent upon learning of the divorce. (*Barnett, supra,* 54 Cal.2d at p. 374.) The bureau argued (1) the formal consent in favor of the married couple did not constitute consent in favor of the single parent, and (2) the informal consent, which was expressed in letters written by the natural mother to the divorced woman, was invalid because it

did not comply with a statutory requirement that a consent be signed on a form prescribed by the department and witnessed by a department representative or notary public. (*Barnett, supra,* 54 Cal.2d at p. 376.)

The Supreme Court affirmed the order of adoption, stating "[t]he manifest overall purpose of the requirements...is to prove that the natural mother's written declaration of consent to the adoption actually was knowingly and freely signed by her. Here that purpose is fully accomplished; there is no question that the natural mother [] freely and formally consented to adoption by [the married couple] and there is no question but that thereafter, with knowledge of [the divorce] the natural mother, by letters from Nebraska, willingly and knowingly

consented to adoption by [the divorced woman] alone." (*Barnett, supra,* 54 Cal.2d at p. 379.) The court also stated adoption laws should be liberally construed to sustain, rather than defeat their main objective of promoting the welfare of children. (*Barnett, supra,* 54 Cal.2d at p. 377.)

We recognize *Barnett* is not directly on point because it was an adoption proceeding rather than a rescission action. It has been said that the best interests of the child are not at issue in an action to rescind relinquishment of a child for adoption. (*In re Cheryl E., supra,* 161 Cal.App.3d at p. 603.) Nevertheless, although the child's best interests are not directly at issue, we believe the principle of liberal construction applies to relinquishments as part of the body of

adoption laws.

Thus, the Supreme Court has said: "[T]he filing of a certified copy of the relinquishments with the [department] establishes rights which thereafter cannot be involuntarily withdrawn. The legislative scheme for the placement of relinquished children contemplates that the statutory proceedings will progress unhampered by extrinsic matters and with assurance that proper proceedings may consummate a valid adoption." (*Adoption of Graham, supra,* 58 Cal.2d at p. 906.) Neither the statutes nor the regulations provide invalidation of relinquishments as a penalty for the agency's violation of the regulations. To the contrary, the statutes and regulations express the policy in favor of upholding the validity of relinquishments by providing relinquishments are final upon filing.

(Fam. Code, § 8700, subd. (d); § 35167.)

We therefore conclude an adoption agency's violation of DSS regulations does not automatically invalidate relinquishments.

Plaintiffs citi *Morton* v. *Ruiz* (1974) 415 U.S. 199, 235 [39 L.Ed.2d 270, 294] for the proposition that an administrative agency's failure to follow its own regulations will invalidate agency action. Plaintiffs quote from that case: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." (*Id.* at p. 235 [39 L.Ed.2d at p. 294].) As an agent of the state, say plaintiffs, CHS was obliged to follow DSS regulations upon penalty of invalidation of the relinquishments. However, *Morton* v. *Ruiz* is distinguishable.

In *Morton* v. *Ruiz*, Native Americans living off the reservation but in a Native American community near the reservation applied for general assistance benefits from the Bureau of Indian Affairs (BIA). BIA denied benefits under a rule in its internal operations manual limiting eligibility to Native Americans living "on reservations." (415 U.S. at pp. 204, 235 [39 L.Ed.2d at pp. 277, 294].) The United States Supreme Court held BIA could not deny benefits to Native Americans who lived in a Native American community near their native reservation, and who maintained close economic and social ties with the reservation and had not been assimilated into general society. (415 U.S. at pp. 211 [39 L.Ed.2d at pp. 280-281].) In budget requests, BIA had led Congress to

believe the appropriations were for Native Americans on or near the reservations. (415 U.S. at pp. 299-230 [39 L.Ed.2d at pp. 290-291].) In dictum, the high court determined BIA could not rely on its internal operations manual's limitations of eligibility to Native Americans "on reservations," because BIA had failed to publish these eligibility restrictions in the Federal Register or in the Code of Federal Regulations, as required by the federal Administrative Procedure Act (APA). (415 U.S. at pp. 232-235 [39 L.Ed.2d at pp. 292-294].) The APA itself contained a sanction that persons could not be adversely affected by matter required to be published and not so published. (*Id.* at p. 233 [39 L.Ed.2d at p. 293].) Additionally, denial of benefits under the

circumstances would be inconsistent with "'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'" (*Id.* at p. 236 [39 L.Ed.2d at pp. 294-295].)

Thus, *Morton* v. *Ruiz* applied a statutory sanction under federal administrative law. Here, plaintiffs cite no state administrative law imposing a similar sanction. Moreover, *Morton* v. *Ruiz* "is best understood in its unique factual context. The unfairness of BIA's sequence of actions at issue in *Ruiz* presented an unusually compelling case in the context of native Americans with whom the United States has a special trust relationship."[19] (1 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) § 6.5. p. 254; see also, *Ali* v. *Reno* (S.D.N.Y. 1993)

829 F.Supp. 1415, 1427.)

Plaintiffs cite *Hock Investment Co. v. City and County of San Francisco* (1989) 215 Cal.App.3d 438. There, an apartment house owner alleged it submitted an application for condominium conversion before adoption of a new restrictive ordinance and in reliance on a department of public works order promising that applications would be evaluated under the ordinance in effect on the date of the submittal. The appellate court held the trial court abused its discretion in sustaining a demurrer where it appeared the plaintiff could state a cause of action based on estoppel if the plaintiff reasonably relied on that promise to its significant detriment. (Id. at pp. 444, 449.) Thus, *Hock* does not support plaintiffs' claim that regulatory

violations automatically invalidate relinquishments.

Plaintiffs also cite two cases for the following proposition: "If an agency in its proceedings violates its rules and prejudice results, any action taken as a result of the proceedings cannot stand." (*Scott* v. *Heckler* (7th Cir. 1985) 768 F.2d 172, 178-179; *Howard* v. *Heckler* (N.D. Ill. 1986) 661 F.Supp. 654, 656.) However, this proposition, which on its face requires prejudice, does not support plaintiffs' argument that defendants' violation of DSS regulations automatically vitiates the relinquishments. Prejudice is required.

Plaintiffs cite *Adoption of Kay C., supra,* 228 Cal.App.3d. 741 for its statement: "He who claims that an act of adoption has been accomplished must show that every essential requirement

has been complied with." (*Id.* at p. 750, [affirming order to set aside adoption at request of adoptive parents who had not been informed of minor's borderline personality disorder].) However, no adoption is at issue in this case, since the trial court ordered a stay of the adoption proceedings. Moreover, the statement's reference to "essential requirements" is consistent with our conclusion that nonprejudicial deviations from the regulations will not interfere with the adoption process.

Plaintiffs also cite matter of *Matter of the Adoption of P.E.P.* (N.C. 1991) 407 S.E.2d 505 for its statement: "'Considering the nature and great importance of the adoption of children into the home and family in comparison with most other transactions of life, it seems to us amazing that so little

regard is often paid to the vital necessity of legality. The necessary steps are easy to understand and easy to observe, and only a fair degree of attention at the right time will serve to prevent frustration, disappointment and heartbreak.' [Citation.] [¶] The procedural safeguards provided in the adoption statutes are not mere window dressing--they serve to protect the interest of the parties, the child, and the public." (*Id.* at p. 511.)

However, *Matter of the Adoption of P.E.P., supra,* did not hold regulatory violations automatically vitiated agency action. There, the Supreme Court of North Carolina invalidated an adoption proceeding because of "statutory violations [by the adoptive parents and their attorney], together with numerous other irregularities, under the

circumstances of this case...." (407 S.E.2d at pp. 511-512.) The court agreed with the proposition that "'any single procedural aberration, looked at in isolation, may not appear to be sufficient to void the adoption. When *viewed together,* however, the defects in this case are substantial and serious enough'" to invalidate the adoption. (407 S.E.2d at pp. 511, original italics.) The court also agreed the procedural irregularities in the case before it were apparently deliberate. (*Ibid.*) Among the defects were (1) the adoptive parents' attorney falsely advised the out-of-state expectant mother that she had to come stay in the same state as the adoptive parents; (2) the adoptive parents in effect "bought" the baby in violation of state law by paying money to and on behalf of the

natural mother; and (3) the adoptive parents' attorney failed to serve proper notice of proceedings on the natural father, even though the attorney was aware of the father's identity and opposition to adoption. (*Ibid.*)

Thus, the *P.E.P.* case does not support plaintiffs' claim that noncompliance with DSS regulations automatically vitiates the relinquishments. It merely allows violations to be considered as a ground for invalidating action. We accord plaintiffs the same opportunity in this case.

Plaintiffs claim prejudice is presumed from violation of the regulations. However, plaintiffs cite no authority to support their position.

As we discuss *post*, prejudicial noncompliance does constitute grounds

for rescission of relinquishments under the doctrine of constructive fraud. This provides a sufficient remedy for parents who allege regulatory violation, without doing violence to the policy in favor of upholding relinquishments.

In their reply brief, plaintiffs for the first time argue that if this were a case about purchase of an automobile, "no one" would dispute that failure to comply with state regulations would invalidate the transaction. Plaintiffs argue parents deserve no less protection. We need not address this new argument, which is unsupported by authority. However, we point out that invalidation for noncompliance in the care sales context is a remedy expressly created by statute. (E.g., Civ. Code, § 2983.) Here, no statute or regulation calls for invalidation of a

relinquishment due to noncompliance with DSS regulations.

We conclude plaintiffs have failed to show that noncompliance with DSS regulations automatically voids relinquishments under principles of administrative law.

B. Due Process

Plaintiffs contend that because parenting is a constitutionally protected right and because relinquishment terminates parental rights, an adoption agency's noncompliance with regulations constitutes a deprivation of procedural due process by an agent of the state.[20] According to plaintiffs, an agreement to relinquish a child for adoption must fail if the agency fails strictly to comply with the regulations. We disagree.

The Fourteenth Amendment to the federal constitution provides in relevant part: "... nor shall any state deprive any person of life, liberty, or property, without due process of law;...

"Only those actions that may fairly be attributed to the state...are subject to due process protection. [Citations.]" (*Coleman* v. *Department of Personnel Administration* (1991) 52 Cal.3d 1102, 1112.) However, private conduct may become so entwined with governmental action as to become subject to the Due Process guarantees of the Fourteenth Amendment. (*Adams* v. *Department of Motor Vehicles* (1974) 11 Cal.3d 146, 152.)

Here, defendant CHS, as a licensed adoption agency, is fairly characterized as an agent of the state. Thus, *Scott* v. *Family Ministries* (1976) 65

Cal.App.3d 492 held the state is entangled with licensed private adoption agencies such that the adoption agency is bound by regulation limiting what religious restrictions may be imposed on adoptive parents. (*Id.* at pp. 506-507.) The *Scott* court said: "The agencies are delegated the governmental case work function in the adoption process. The state delegates to them the process of investigation and reporting to the court that in nonagency adoptions must be performed by [state]. The state delegates to the private licensed agencies the state's power and obligation to select adoptive parents and to bar all others from the right to adopt the particular child.... In essence if a private-licensed adoption agency imposes a [] restriction in exercising its delegated power and

responsibility it is acting for and on behalf of the state when it does so. [¶] We thus conclude that Family Ministries is bound by our construction of [the California Code of Regulations] to the same extent as the state itself is bound." (*Ibid.*) Similarly, we conclude defendant CHS, a licensed private adoption agency, is a governmental actor for purposes of due process analysis.

Parenting is a fundamental right and "[n]o human bond is cemented with greater strength than that of parent and child." (*Michelle W. v. Ronald W.* (1985) 39 Cal.3d 354, 357 [paternity case]; In *re David C.* (1984) 152 Cal.App.3d 1189, 1208 [Civ. Code, § 232, proceeding to terminate parental rights due to neglect]; In *re Robert D.* (1984) 151 Cal.App.3d 391 [grandparent

visitation rights].) Because parents enjoy a fundamental liberty interest in the care, custody and control of their children, parental rights cannot be terminated except according to procedures that satisfy due process. (*Santosky v. Kramer* (1982) 455 U.S. 745, 753-754 [71 L.Ed.2d 599, 606].) At the same time, constitutional rights may generally be waived, provided the waiver is knowing, voluntary, and intelligent. (*D.H. Overmyer Co. v. Frick Co.* (1972) 405 U.S. 174, 185-186 [31 L.Ed.2d 124, 134].) In particular, constitutional rights to a parent-child relationship may be waived as long as the waivers are "voluntary [] and knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (*San Diego County Dept. of Pub. Welfare v. Superior Court*

(1972) 7 Cal.3d 1, 10, internal quotations omitted, citing *In re Hannie* (1970) 3 Cal.3d 520, 526 [waiver of constitutional rights in criminal context]; see also *Brady v. United States* (1970) 397 U.S. 742, 748 [25 L.Ed.2d 747, 756], [same].)

Due process may require that certain procedures be followed to insure that a waiver of constitutional rights is accomplished knowingly, voluntarily, and intelligently. (See, e.g., *Isbell v. County of Sonoma* (1978) 21 Cal.3d 61, 68-70 [confession of judgement].) Here, plaintiffs argue the regulation (and each of them) specify the due process to which plaintiffs were entitled. At this point, we disagree.

Constitutionally mandated requirements of procedural due process are found in the constitution, as

interpreted by the courts, and not in state statutes. (*Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 541 [84 L.Ed.2d 494, 503]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 576-577.)

"[T]he mere fact that a state agency violates its own procedures does not, *ipso facto*, mean that it has contravened federal due process requirements." (*Morris v. City of Danville, Va.* (4th Cir. 1984) 744 F.2d 1041, 1048, fn.9.) "A failure to comply with state or local procedural requirements does not necessarily constitute a denial of due process, the alleged violation must result in a procedure which itself falls short of standards derived from the Due Process Clause. [Citation.]" (*Mangeles v. Pena* (10th Cir. 1986) 789 F.2d 836, 383.)

"An agency's violation of its regulations is not unconstitutional unless the regulations are necessary to afford due process. [Citation.] When a property interest has been created, the due process clause, not state regulations, defines what process is constitutionally mandated. [Citations.]" (*Bowens v. N.C. Dept. of Human Resources* (4th Cir. 1983) 710 F.2d 1025, 1019; see also *McDarby v. Dinkins* (2d Cir. 1990) 907 F.2d 1334, 1337; *Goodrich v. Newport News School Bd.* (4th Cir. 1984) 743 F.2d 225; *Bates v. Sponberg* (6th Cir. 1976) 547 F.2d 325, 329-330.)

Atencio v. Bd. of Ed. of Penasco Ind. Sch. Dist. (10th Cir. 1981) 658 F.2d 774 is instructive. There, plaintiff Atencio brought a civil rights action under 42 U.S.C. section 1983

claiming he had been denied procedural due process when he was discharged form his position as superintendent of schools. He contended the school district violated a statewide regulation that required two conferences with an employee's supervisor prior to notice of discharge. The Circuit Court rejected the challenge, concluding the conference procedure was not required by due process and plaintiff was afforded due process when he was given notice and a hearing prior to discharge. (*Atencio, supra,* 658 F.2d at p. 779.)

Here, we conclude the procedures actually afforded plaintiffs were more that adequate to insure that their relinquishments of parental rights were given knowing, voluntarily and intelligently. The regulations violated by defendants[21/] were not necessary to

insure a knowing, voluntary and intelligent waiver of parental rights and were therefore not required by constitutional guarantees of procedural due process. Rather, as a matter of legislative grace, these regulations required procedures not required by due process. (See *Franchise Tax Board v. Superior Court* (1950) 36 Cal.2d 538, 549 [Legislature provided hearing not required by due process].) In short, we conclude plaintiffs were afforded adequate procedural due process.[22/]

IV. Constructive Fraud

Plaintiffs contend constructive fraud constitutes a ground for rescission without regard to fraudulent intent by defendants, and the trial court erred in failing to consider that theory. We agree constructive fraud constitutes a ground for rescission

without regard to intent of the defendants. We will conclude, however, that plaintiffs have waived the contention of the trial court's failure to consider that theory because plaintiffs did not request a statement of decision. Since, as we have seen, the regulatory violations in this case were nonprejudicial, we will also conclude plaintiffs fail to show any abuse of discretion in the trial court's denial or rescission on a constructive fraud theory.

A. Constructive Fraud Is A Basis For Rescission

Actual fraud[23] and undue influence[24] generally involve active misconduct, such as an intent to deceive, or misrepresentation by the defendant. This appeal does not involve any misrepresentation or intent to

deceive. As we have seen, the trial court found defendants to be ethical, principled professionals. Instead, this appeal involves at most negligent *omissions* by defendants in failing to comply with DSS regulation. Unlike fraud and undue influence, a constructive fraud claim allows relief for negligent omissions constituting breach of duty in a confidential relationship.

Thus, by statute, "[c]onstructive fraud consists: [¶] 1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to *his prejudice,* or to the prejudice of anyone claiming under him; or, [¶] 2. In any such act or omission as the law specially declares to be fraudulent,

without respect to actual fraud." (Civ. Code, § 1573, italics added.) Constructive fraud "arises on a breach of duty by one in a confidential or fiduciary relationship to another which induces justifiable reliance by the latter to *his prejudice*." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 129, italics added.) Actual reliance and causation of injury must be shown. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 666, pp. 116-117, citing *County of San Diego v. Utt* (1916 173 Cal. 554, 560.)

Plaintiffs assert constructive fraud constitutes a ground for rescission in this case because adoption agencies are in a fiduciary relationship with relinquishing parents. However, plaintiffs cite no authority for the proposition that the relationship is a

fiduciary one. A fiduciary is "a person having a duty, created by this undertaking, to act primarily for the benefit of another in matters connected with his undertaking." (Rest.2d Agency, § 13, com. a; *Destefano v. grabrian* (Colo. 1988) 763 P.2d 275, 284.) We thus agree with defendants that an adoption agency's concurrent responsibilities to the other parties, the child and prospective adoptive parents, whose interests may potentially conflict with the birth parents, negates a fiduciary relationship with the birth parents.

However, a relationship need not be a fiduciary one in order to give rise to constructive fraud. Constructive fraud also applies to nonfiduciary "confidential relationships." (*Odorizzi v. Bloomfield School Dist. supra,* 246

Cal.App.2d at p. 129.) "Such a confidential relationship may exist whenever a person with justification places trust and confidence in the integrity and fidelity of another." (*Ibid.*, [bare allegation of employer-employee relationship insufficient to support confidential relationship].) "'A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation may exist although there is no fiduciary relation;...'" (*Davies v. Krasna* (1975) 14 Cal.3d 502, 510 [dictum].)

The existence of a confidential relationship is generally a question of fact. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 383-384.) Here, plaintiffs contend a confidential

relationship existed in this case because Tyler was in a weakened condition and placed trust in CHS because she believed she was dealing with the state, and both plaintiffs were young and inexperienced. We will assume for the sake of argument that a confidential relationship existed. (See *re Cheryl E., supra,* 161 Cal.App.3d at p. 601 [characterizing adoption agency's relationship as a confidential one for undue influence purposes where relinquishing mother was in weakened state].)

This does not, however, mean that *any* deviation from the regulations will invalidate the agreements to relinquish the child for adoption. Constructive fraud requires a showing that the plaintiff was misled to his or her prejudice. (Civ. Code, § 1573; *Odorizzi*

v. Bloomfield School Dist. supra, 246 Cal.App.2d at p. 129.)

As indicated, plaintiffs argue the law presumes prejudice from violation of the regulations, but they cite no authority to support their position. Instead, their sole reliance on a presumption of prejudice highlights the absence of actual prejudice in this case.

Plaintiffs also argue it was not their burden to prove prejudice. We disagree.

Under Evidence Code section 500: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Proof of cause for rescission was essential to plaintiffs' claim for

relief. Proof of prejudice was essential to plaintiffs' constructive fraud theory. (Civ. Code, § 1573.)

Plaintiffs argue they had no burden because the adoption agency as the dominant party is assumed to have exerted influence, with the result that *any* noncompliance constitutes undue influence per se. No authority is cited for this proposition.

Though not cited by plaintiffs, it has been said in other contexts that where a confidential relationship exists and the dominant party obtained an advantage from a transaction, it is presumed undue influence was exerted, and the burden shifts to the dominant party defendant to prove the transaction was voluntary. (See *Rader v. Thrasher* (1962) 57 Cal.2d 244, 249, citing former Civ. Code, § 2235, See now Prob. Code, §

16004; *Barbara A. v. John G., supra,* 145 Cal.App.3d at pp. 383-384; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 425, pp. 381-382.)

However, even assuming that defendants in this case obtained an advantage from the relinquishments, we do not believe a shifting of the burden of proof is appropriate in actions to rescind relinquishments.

First, the presumption that undue influence was exerted is not strictly applied in *non*fiduciary confidential relationships. (1 *Witkin. op. cit. supra,* at p. 383.) More importantly, the Legislature has expressed a policy of according finality to relinquishments by providing that "[u]pon filing with the department, the relinquishment is final [unless there is mutual consent to rescission]." (Fam. Code, § 8700, subd.

(d); see also, *Adoption of Graham, supra,* 58 Cal.2d at p. 906 [strong state policy to give effect to relinquishments]; *Hall v. Department of Adoption, supra,* 47 Cal.App.3d at pp. 902-903 [same].) Though courts have held the statute does not preclude an action in equity to rescind the relinquishment for cause (*Brooks v. Los Angeles County Bureau of Adoptions, supra,* 218 Cal.App.2d 732), we are unaware of any decision placing the burden of proof on the adoption agency in a rescission action by a relinquishing parent.

We believe the policy favoring relinquishments supports placing the burden on the party challenging the relinquishment to show prejudice from noncompliance with applicable regulation. Plaintiffs assert the

statutory provision according finality to relinquishments assumes that the adoption agency has properly complied with all regulations. However, this merely reinforces our conclusion that the burden of proof in a rescission action should remain on the plaintiff seeking to rescind the relinquishment. Thus, if agency compliance is assumed, then the burden is properly placed on the party who claims noncompliance.

Although this is not an adoption proceeding, requiring plaintiffs to show prejudice in order to rescind their relinquishments is also consistent with the rule that adoption requirements "are to be liberally construed in order to effect the object of the adoption statutes in promoting the welfare of children, bereft of the benefits of the home and care of their real parents...."

San Diego County Dept. of Pub. Welfare v. Superior Court, supra, 7 Cal.3d at p. 16, internal quotes omitted.)

Finally, we think that plaintiffs are in the best position to adduce evidence showing they were prejudiced by noncompliance with regulation.

We conclude constructive fraud constitutes a basis for rescission of a relinquishment of a child for adoption. However, we also conclude the plaintiff bears the burden of proving all aspects of constructive fraud, including prejudice.

B. Waiver Of Contention That Court Disregarded Theory

Plaintiffs contend the trial court prejudicially erred in failing to consider constructive fraud as a ground for rescission. They base this contention on the trial court's remark

in its tentative decision (the "OPINION AND RULING") that defendant's violation of the regulations was of "limited relevance." According to plaintiffs, the trial court thus improperly disregarded the regulatory noncompliance because it found no fraudulent intent on the part of defendants.

However, a "judgment or order of a lower court is presumed to be correct on appeal, and all intendment and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux, supra,* 51 Cal.3d at p. 1133.) Parties wishing to avoid inferences in favor of the judgment must obtain a statement of decision under Code of Civil Procedure, sections 632 and 634. (*Id.* at pp. 1133-1134.)

Here, no party requested a statement of decision. The trial

court's written opinion and ruling was not a statement of decision but merely a tentative decision, which cannot be used to impeach the judgment.[25/] (9 Witkins (3d ed. 1985) Appeal, §§ 263-265, pp. 270-273.)

Thus, plaintiffs are left only with their contention that undisputed regulatory violations establish constructive fraud. We construe this contention as a claim that the trial court abused its discretion in denying rescission on a constructive fraud theory. We reject the contention.

C. Admitted Violations Do Not Constitute Constructive Fraud

As we have seen in part II, *ante*, defendants violated the DSS regulations by failing to (1) discuss the alternative of placing the baby with extended family members, (2) discuss

educational or employment resources, (3) give copies of the executed documents to plaintiffs, and (4) obtain Darrah's medical history.

Plaintiffs fail to show these violations, separately or cumulatively, caused them to make a decision they would not otherwise have made. Thus, the violations did not prejudice plaintiffs.

We conclude plaintiffs fail to show any error or abuse of discretion in the trial court's judgment denying rescission of the relinquishments. We therefore need not address defendants' arguments that plaintiffs are estopped to challenge the validity of the relinquishments because they led all other parties to believe the child was being permanently relinquished.

DISPOSITION

The judgment is affirmed.

s/Sims, Acting P.J.

We Concur:

s/Scotland, J.

s/Raye, J.

[1/] Since filing the complaint, Tyler has married Darrah and assumed his surname. For the sake of clarity, we will refer to her as Tyler.

[2/] Although plaintiffs appealed from the judgment without restriction, defendants DCPC and Huntziker have not filed a respondent's brief in this court. Nevertheless, plaintiffs' contentions on appeal are directed only against CHS and Heszler, as the parties responsible for complying with the DSS regulations. Since no contentions are directed against DCPC or Huntziker, we shall affirm the judgment in their favor without discussion. Hereafter, we use the term "defendants" to refer to CHS and Heszler only, unless otherwise indicted.

[3/] In their appellate briefs, plaintiffs present a distorted picture

of the factual background of this case. This case was a credibility contest, with sharply conflicting evidence. At trial plaintiffs' version of events was that they contacted defendants for help in telling Tyler's parents they had a baby but instead defendants advised them not to tell their families and coerced, manipulated, and intimidated them into giving up the baby for adoption. Defendants denied plaintiff's accusations and presented evidence contradicting plaintiffs' testimony, as set forth below. The trial court disbelieved plaintiffs and believed defendants, as is reflected in the court's 11-page "OPINION AND RULING." Yet plaintiffs in their appellate briefs persist in presenting their discredited version of the facts. Plaintiffs also misrepresent the extent of defendants' noncompliance with DSS regulations.

Plaintiffs have an obligation to present an accurate statement of facts on appeal. (Cal. Rules of Court, rule 13.) As a reviewing court, it is not our province to analyze evidentiary conflicts. (In re Cheryl E. (1984) 161 Cal.App.3d 587, 600.) We therefore disregard plaintiffs' presentation of "facts" and set forth the facts consistent with the judgement.

[4] We refer to Darrah as the "alleged father," though he does not dispute paternity, because "alleged father" is a term of art in this context. (see fn. 5, *post*.)

[5] An "alleged father" is one who does not meet the statutory definition of a

"presumed father," i.e., one who is married to the mother or receives the child into his home and openly holds the child out as his own. (Fam. Code, § 7611.) An alleged father does not have automatic physical custody rights. His consent is not required for an adoption unless he demonstrates a full commitment to parental responsibility--emotional, financial, and otherwise. (Fam. Code, § 8605; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849.) The type of counseling required of the adoption agency differs depending on whether a man is a "presumed father" or an "alleged father." (Cal. Code Regs., tit. 22, § 35134, subd. (a), (e).)

Defendants considered Darrah to be an "alleged father" rather than a presumed father because plaintiffs were not married and, although the baby visited at Darrah's house, Darrah did not take the child into his home to *reside* or *openly* acknowledge paternity. He did not tell his family about the baby (until the fall of 1991). Other than telling the truth to one friend, Darrah indicated to his roommates that Tyler was babysitting and Darrah did not know whose child it was.

On appeal Darrah makes no argument that he is a "presumed father."

6/ Defendants assert the child, now three years old, continues to live with the prospective adoptive family, with whom she has lived since the relinquishments. Defendants argue against removal of the child from the only family she has ever known. However, as noted by the trial court,

the best interests of the child are not at issue in a rescission action. (*In re Cheryl E.* (1984) 161 Cal. App. 3d 587, 603)

7/ No statement of decision was requested. The "OPINION AND RULING" does not constitute a statement of decision (Cal. Rules of Court, rule 232 [announcement of tentative decision]) but may be used on appeal to discover the grounds for the judgment and show the absence of prejudice in any error. (*Kuffel* v. *Seaside Oil Co.* (1977) 69 Cal.App.3d 555, 568; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 263-265, p. 270-273.)

8/ In their reply brief, while insisting their appeal raises no challenge to the sufficiency of evidence, plaintiffs nevertheless contend no substantial evidence supports a finding that Heszler is ethical and professional. However, it is unfair to raise new arguments for the first time in a reply brief; we therefore need not consider the contention. (*Neighbours* v. *Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325,335. fn 8.) Moreover, having reviewed the record, we conclude ample evidence supports the judgment.

9/ Since plaintiffs signed their relinquishments, the Civil Code provisions material to this case were renumbered, then later replaced by the new Family Code, which was enacted by Statutes 1992, chapter 162, section 10, and became operative January 1, 1994. The new Code applies to pending proceedings, with certain exceptions,

e.g., contents and execution of documents filed before the operative date are governed by the old law. (Fam. Code, § 4.) The provisions at issue in this case have been continued in the new Family Code without substantial change.

10/ Welfare and Institutions Code section 10553, which is cited in the California Code of Regulations as authority for creation of the regulations here at issue, provides: "The director [of the department of Social Services] shall [] [¶] (e) Formulate, adopt, amend or repeal regulations and general policies affecting the purposes, responsibilities, and jurisdiction of the department and which are consistent with law and necessary for the administration of public social services...."

11/ We note under Family Code section 8621 (added by Stats. 1993, ch. 758, § 6, operative Jan. 1, 1995), the Department of Social Services is expressly charged with monitoring licensed adoption agencies and reporting violations of regulations to the appropriate licensing authority.

12/ The substance of former Civil Code section 224m has been continued in new Family Code section 8700, subdivision (d). Rescission by the relinquishing parents is also allowed if the relinquishment designates specific adoptive parents and the child is not placed with those persons. (Fam. Code, § 8700, subd. (e)-(g).)

[13] Undesignated section references are to title 22 of California Code of Regulations.

[14] Tyler asked Heszler if the prospective adoptive family could pay Darrah's air fare form San Diego. Heszler said she was not sure but would check. Tyler commented that such an expense is regularly paid in independent adoptions.

[15] Elsewhere in their brief, plaintiffs contend defendants violated section 35134, subdivision (a)(8), which requires that parents be advised of the right to revoke or rescind. However plaintiffs fail to cite anything in the record showing this point was raised at trial. The portions of the transcript cited by plaintiffs refer only to a *post*-relinquishment conversation several months after the relinquishment forms were signed, in which Tyler asked for the child back and Heszler assertedly told Tyler she had no rights. This evidence was contradicted by Heszler, who testified what she told Tyler was that she (Heszler) would not intercede in Tyler's behalf with the prospective adoptive parents. Heszler sent Tyler forms to request rescission. In any event, these events occurred after plaintiffs signed the relinquishments and therefore have no bearing on whether the relinquishments were knowing and voluntary. Moreover, the advisement concerning revocation and rescission were contained in the Statement of Understanding.

[16] Former Civil Code section 222.26,

provided in part: "(a) No agency shall place a child for adoption unless a written medical report on the child's medical background, and if available, so far as ascertainable, the medical background of the child's biological parents, has been submitted to the prospective adoptive parents...." (Stats. 1990, ch. 1363, § 3.) This provision was repealed (Stats. 1992, ch. 162, § 2) but its substance has been continued in Family Code, section 8608, 8706. (Stats. 1992, ch. 162, § 10.)

17/ Though not argued by plaintiffs, we recognize a secondary purpose of the regulation may be to protect birth parents from abandonment of a child by prospective adoptive parents who later learn of medical problems. Plaintiffs assert that Darrah's family has a history of cancer, heart disease, asthma, and scoliosis (curved spin). However, the cited portion of the record does not show evidence to that effect but only questions posed by plaintiffs' attorney asking whether Heszler was aware of such history in Darrah's family at the time of taking the relinquishments. Heszler said she was not aware. This is not evidence of Darrah's medical history. Even assuming plaintiffs' representation of the medical history is accurate, plaintiffs do not contend it has led or might lead to the prospective adoptive parents abandoning the adoption plan.

18/ Licensed private adoption agencies are considered agents of the state. (*Scott* v. *Family Ministries* (1976) 65

Cal.App.3d 492, 506-507.) In any event, a private party's noncompliance with a law is similarly subject to an analysis of legislative intent in order to determine the effect of noncompliance where the statute does not specify an effect. (See *General Motors Accept. Corp.* v. *Kyle* (1960) 54 Cal.2d 101, 108-112.)

19/ We recognize plaintiffs claim they had a fiduciary relationship with defendants for purposes of constructive fraud analysis. As we discuss *post*, the relationship, though a confidential one, was not a fiduciary relationship.

20/ We note plaintiffs limit their due process arguments to matters of procedural due process. We also note plaintiffs do not develop any argument based on the state constitution.

Plaintiffs contend parents have a constitutionally protected right to be free from unwarranted state intrusion into their relationship with their children, under the right to privacy discussed in *Roe v. Wade* (1973) 410 U.S. 113 [35 L.Ed.2d 147]. According to plaintiffs, *any* noncompliance with the regulations constitutes "unlawful" conduct, which is necessarily "unwarranted" conduct, which necessarily constitutes "unwarranted state intrusion" into parental rights in violation of the right to privacy. We do not find plaintiffs' logic persuasive.

21/ Failure to (1) discuss the option of placing the child with extended family members (2) discuss educational

and employment resources (3) give copies of executed documents to plaintiffs and (4) obtain the father's medical history.

22/ Though not raised by defendants, we note Darrah as an alleged father rather than a presumed father is not necessarily entitled to the same due process as the mother. (See *Lehr v. Robertson* (1983) 463 U.S. 248, 256-262 [77 L.Ed.2d 614, 623-627] [unmarried father lacking custodial, personal, or financial relationship with child was not entitled to notice of adoption proceeding]; *Adoption of Kelsey S., supra,* 1 Cal.4th at p. 849 [parental relationship of putative father is worthy of constitutional protection only if father demonstrates full commitment to parental responsibility--emotional, financial, and otherwise].) Since we conclude reversal of the judgment is not warranted by the full due process rights to which Tyler is clearly entitled, we need not consider whether a lesser standard applies to Darrah.

23/ Actual fraud generally requires that the defendant act "with intent to deceive [] or to induce [the plaintiff] to enter into the contract..." (Civ. Code, § 1572.) However, a fraud claim may also be based on negligent misrepresentations. (*In re Cheryl E., supra,* 161 Cal.App.3d at p. 599.)

24/ Undue influence consists "1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over

him; [¶] 2. In taking an unfair advantage of another's weakness of mind; or, [¶] 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ. Code, § 1575.) Undue influence "consists in the use of excessive pressure by a dominant person over a servient person resulting in the apparent will of the servient person being in fact the will of the dominant person." (*In re Cheryl E., supra,* 161 Cal.App.3d at p. 601.) "Undue influence differs from fraud in that the importunities or beseeching may or may not include fraudulent representation. [Citations]." [(1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 423, p. 380.)

25/ Moreover, contrary to plaintiffs' position, the written opinion and ruling does not unambiguously display an error of law. Since the trial court referred to "minor deviations" from the regulations, it is possible the court rejected a constructive fraud theory due to its conclusion there were no prejudicial violations rather than due to an erroneous belief that constructive fraud required fraudulent intent.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF YOLO

LEA TYLER AND MATTHEW DARRAH, Plaintiffs, v. CHILDREN'S HOME SOCIETY OF CALIFORNIA et al., Defendants.	No. 69606 OPINION AND RULING

This case came on regularly for trial before the Court beginning on March 2, 1993 on the issue of whether or not a relinquishment for adoption can be rescinded by the Plaintiffs, Matthew and Lea Darrah. The Plaintiffs were represented by Brenda J. Russo, attorney at law. Defendants Children's Home Society of California and Dee Heszler were represented by Timothy P. Murphy, attorney at law. Defendants Davis

Crisis Pregnancy Center and Kathy Huntziger were represented by William P. Brodbeck, attorney at law.

It is the Plaintiffs' position that the relinquishments for adoption were obtained from the Plaintiffs by the Defendants by fraud, coercion or undue influence. It is the Defendants' position that the relinquishments were freely, intelligently, and voluntarily given. The Court has previously determined that the burden of proving fraud, coercion or undue influence remains on the Plaintiffs throughout the trial and that the burden of proof is a preponderance of the evidence. It must be noted that the child Michelle is not a party to this action. Although the Court fervently hopes that its decision will be in the best interest of the child, that issue is not for the Court's

consideration in its decision as to whether or not the relinquishment for adoption can be rescinded.

There are certain matters that were presented to the Court during the course of the trial that the Court believes were of limited relevance. The Court will state those items briefly and then will move to the crux of the case which is a factual determination as to which version of the facts leading up to the relinquishment is accurate. It is the factual determination, based on direct and circumstantial evidence and factors of credibility that will guide this Court in its decision.

One item of limited relevance is whether or not the adoption agency, Defendant children's Home Society and its employee, Defendant Heszler followed the adoption regulations. In equity

actions such as the one before the Court, minor deviations from statutory mandates are insignificant, absent fraud or wrongful conduct in the departures from the statue. There were departures from statutory requirements in the case before the Court, e.g. the review by Raymond Cheroske, the director of adoption services for Defendant Children's Home Society, was insufficient by any reasonable standard, but the Court can not say his conduct was fraudulent or intentionally wrongful. Even if it were found to be so, it would not affect the issue of whether the relinquishments for adoption were properly given by the Plaintiffs.

Another item of limited relevance is whether Plaintiff Matthew Darrah should be considered a presumed father or an alleged father. If he had been

considered to be a presumed father by Defendant Heszler, rather than an alleged father, he would have been asked to sign a Statement of Understanding identical in form to the one signed by Plaintiff Lea Darrah. The correctness of Defendant Heszler's determination of Plaintiff Matthew Darrah's status is of no consequence in determining if the relinquishments were validly procured.

Fraud consists of a knowing misrepresentation or omission of a material fact or facts. It is done with an intent to induce a person or persons' reliance on the misrepresentation or omission. There must be justifiable reliance and damage to the person or persons as a result of the reliance. Undue influence is coercive persuasion which overcomes the will of another by taking advantage of his or her weakness

or distress.

There was extensive testimony by all the natural persons who are parties to this lawsuit. The Court made detailed notes of the testimony of all witnesses (including the parties) and very carefully observed the demeanor of all witnesses (including the parties) during the giving of testimony. In assessing the credibility of the witnesses, among other things, the Court has considered the following factors: the extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified; the ability of the witness to remember or to communicate any matter about which the witness has testified; the character and quality of that testimony; the demeanor and manner of the witness while

testifying; the existence or nonexistence of a bias, interest or other motive; evidence of the existence or nonexistence of any fact testified to by the witness; the attitude of the witness toward this action or toward the giving of testimony; a statement previously made by the witness that is consistent or inconsistent with the testimony of the witness; and any admission by the witness of untruthfulness.

After a thorough review of all the testimony and exhibits in the case and being mindful of the previously stated burden of proof, it is the Court's finding that the Plaintiffs' relinquishments for adoption were not procured by fraud, coercion or undue influence and that the Plaintiffs have not proved their case by a preponderance

of the evidence.

The Court believes that the Plaintiffs at an early stage (perhaps even before the birth of Michelle) made the most difficult decision of their lives to relinquish their child for adoption. The decision was made not because they did not love their child but because of their difficult personal circumstances. Because of their evident love of their child, it was clearly a decision not taken lightly by the Plaintiffs and it appears they never were comfortable with their decision. The Court believes that the Plaintiffs came to believe that they made a mistake, that they decided finally to tell their parents and when they received (perhaps unexpectedly) support from their parents they decided to seek to regain their child.

The appellate Courts of California have long recognized that it is important to maintain the integrity of adoption procedures, especially the procedure of relinquishment. There is a strong public policy to protect the rights of all parties involved in adoption and to maintain a high degree of predictability and regularity in decisions to avoid any chilling effect on adoption that irregular decisions not based on evidence and law would have. In giving birth parents the right to challenge a relinquishment for adoption, California has attempted to strike a fair balance between the right of the birth parents and the need for finality and stability as it would affect the child and adoptive parents. As stated above, The Court does not believe that the Plaintiffs have demonstrated that

their relinquishments for adoptions were obtained by fraud, coercion or undue influence.

In the Court's opinion the evidence has demonstrated that the Plaintiffs are a loving couple who are intelligent and strong minded and that the Defendants Heszler and Huntziger are ethical, principled and experienced professional individuals. The speedy timetable for relinquishment was established by the Plaintiffs and they came to regret it because subsequent events changed their personal circumstances and they were able to live together, get married and have another child.

The Court believes that the Plaintiffs agreed to keep the pregnancy a secret from everyone. The only one told of the birth other than those associated with the Defendants was a

friend of Plaintiff Matthew Darrah. Everything that the Plaintiffs did was to further the secret being kept. The Plaintiffs bought no baby clothes and no baby furniture and sought no living arrangements off the campus in Davis. Plaintiff Lea Darrah sought no pre-natal care. The birth was done privately in a dormitory bathroom. No help during or after the birth was summoned by Plaintiff Lea Darrah. The Plaintiffs in fact did not want their parents to know of the birth of Michelle and did not tell them until many months after Michelle's birth. These actions are consistent with having a plan to relinquish the baby for adoption and are not consistent with a desire to keep the baby either separately or together by Plaintiffs.

A number of other statements and

actions by the Plaintiffs circumstantially establish in the Court's belief that the relinquishments for adoption were knowingly, intelligently and voluntarily given by both Plaintiffs. The fact that the Plaintiffs gave a Mother's Day card to Christine Hoffman, the prospective adoptive mother, is telling. The card was personalized by Plaintiff Lea Darrah when she wrote "thank you so much for giving Michelle exactly what we want for her, loving parents. Happy Mother's Day!" In addition, the Plaintiffs brought flowers on the day of the signing of the relinquishments to Mrs. Hull (the foster mother), Mrs. Hoffman, and Kathy Huntziger. This can only be considered as a gesture of appreciation and certainly contradicts the Plaintiffs assertion that they were forced into

doing something they did not want to do.

There is little evidence that the Plaintiffs intended to tell Plaintiff Lea Darrah's parents of the birth of Michelle. If the Plaintiffs had intended to find an intermediary or Nikodo they could have done so. The minimal efforts to contact Kathy Salzman to serve as a Nikodo are inconsistent with Plaintiffs' stated intention to tell their parents of the birth of Michelle through an intermediary.

When Defendant Kathy Huntziger first talked to Plaintiff Lea Darrah, Defendant Huntziger credibly testified that Plaintiff Lea Darrah said that she had made a decision on what she wanted to do, that she was 7 1/2 months pregnant (an untrue statement by Plaintiff Lea Darrah), that she was interested in adoption and did she know

anyone interested in adoption. Marie Brown, the Director of the Davis Crisis Pregnancy Center, testified that she took a call from Plaintiff Lea Darrah at the Crisis Pregnancy Center and that Plaintiff Lea Darrah said she was 7 months pregnant (untrue), that she was interested in adoption, and could she talk to someone. The case file of Defendant Children's Home Society which contains contemporaneously made notes bears out the Defendants' contention that Plaintiff Lea Darrah was considering adoption at the first stages and that everything that she did was consistent with her desire to relinquish Michelle in a brief time frame so that it could be put behind her and so that Plaintiff Matthew Darrah could return to San Diego. The notes of Defendant Heszler of the meeting of April 21, 1991

show that Matt and Lea talked about adoption and it was the course they wished to take. It was the only viable option according to Lea. Lea did not mention Nikodo nor ask for an intermediary. The April 21st notes go on to show that Dee Heszler suggested that she could help tell Lea's parents. Lea stated that her parents would never find out. Further notes of April 21 show that Dee Heszler talked to Lea Darrah about raising the child on her own but that Lea couldn't do anything where her parents would find out. Lea Stated she couldn't marry Matt because education was important and that they couldn't given the child what they wanted.

The case file of the April 23rd meeting states that Lea feels the urgency in getting Michelle in a

permanent home. The case file of the May 1st meeting with the Hoffmans also contains some compelling entries such as Lea's statement that she wanted the baby placed Saturday since Matt was leaving Sunday. It is also written that Dee Heszler spoke to Matthew and Lea in the evening of May 1 and that Lea said that she was sure she wanted to place Michelle with the Hoffmans but wanted a second meeting to become better acquainted.

The testimony of Defendant Heszler as to what Plaintiff Lea Darrah said relating to her reasons for not wanting to tell her parents and therefore why she was choosing adoption is highly credible. According to Defendant Heszler, Plaintiff Lea Darrah said that her parents would be deeply disappointed, that they had done so much

for her (including sending her to the University of California at Davis), that her parents considered her to be a role model for her siblings, and that her parents were not aware she was sexually active. Margerite Hull, the foster mother, testified without any apparent bias, interest or motive. Her testimony included the statement that Plaintiff Lea Darrah said that she couldn't tell her parents or her boyfriend's parents about Michelle. Both Margerite Hull and her husband Alden Hull testified that the signing of the relinquishments did not appear forced and that the Plaintiffs appeared to understand what they were doing. Mr. Hull felt that the Plaintiffs were anxious to get it over with and get away from there.

Defendant Heszler also testified as to conversations and meetings with the

Plaintiffs after the relinquishments were signed and that Plaintiffs did not say that they had been coerced or that the Defendants had done anything wrong. For example, Defendant Heszler testified that she next saw Plaintiff Lea Darrah after the signing of the relinquishments on May 30, 1991 at the health department in Woodland. Lea said it was still hard and that she missed Michelle. Lea said nothing about setting aside the relinquishment or that Dee Heszler did anything wrong.

Defendant Kathy Huntziger testified that between April 15 and May 4, 1991, no mention was made to her by the Plaintiffs of a Nikodo or mediator and that nothing was said about Japanese traditions. It was her further testimony that Plaintiff Lea Darrah never varied from her position that her

parents could not know of the birth of Michelle. Defendant Huntziger described the phone call of September 14, 1991. Lea said that she told her parents about Michelle and that she had made a horrible mistake and wanted to get the baby back. The Court believes that this conversation directly shows Plaintiff Lea Darrah's state of mind and intentions from the time the baby was born. There is no credible evidence to believe that Plaintiff Matthew Darrah is in any different position from Plaintiff Lea Darrah except that he may not have instituted a rescission action unless Plaintiff Lea had done so first. The Court notes that Plaintiff Matthew Darrah's notebook contained an entry for October 12, 1991 which notes "End of Lea and Matt." Plaintiff Matthew Darrah testified that he believed he was

meeting with a prospective adoptive couple on May 1, 1991. His reason for meeting with them was to give it a fair chance.

Although they obviously have a strong interest in the case, the Court finds the testimony of the prospective adoptive couple, John and Christine Hoffman, to be very credible. They had an excellent recall of events and details and their testimony was generally consistent with one another but not to the point that the Court would find it contrived, rehearsed or embellished. In general terms they have described the Plaintiffs as loving people with an unwavering purpose, viz. to relinquish their child for adoption to a loving couple. The Hoffmans testified to a sense of urgency by the Plaintiffs brought about by the fact

that Plaintiff Matthew Darrah was in town only through Sunday, that the Plaintiffs wanted to put it behind them and get on with their lives.

It is clear that the Plaintiffs have always been attached to their daughter Michelle as evidenced by the emotion described by witnesses when the question of Michelle's name was discussed. But it is equally clear to the Court that as painful as the decision to relinquish was, it was done voluntarily, intelligently and knowingly by the Plaintiffs and was not the subject of fraud or coercion or undue pressure of any kind. These two intelligent Plaintiffs had more than 24 hours to change their minds about the relinquishment for any reason, including fraud or coercion, and exercise their absolute right to set aside the

relinquishment. They both chose not to do so. The first attempt to set aside the relinquishment came many months after the fact.

The Court also attached significance to the letters and cards sent by Plaintiff Lea Darrah to Plaintiff Matthew Darrah during Lea's pregnancy. There is no mention of the pregnancy, the anticipated delivery of the baby, or any plan to raise a family, or being with Matt for that purpose. There is no mention of a plan to tell the parents of the anticipated birth. In short there is no evidence of a plan which includes the baby. Exhibit AA does refer to marriage but it is clear that Plaintiff Lea Darrah feels that "circumstances just won't allow it yet. Still, I can wish, right? Someday." This letter was postmarked less than two

months before the birth of Michelle. The Court believes that if the Plaintiffs were not considering adoption Plaintiff Lea Darrah would not have made the omissions described above.

The attorney for Defendants Children's Home Society and Dee Heszler is directed to prepare a judgment in conformity with this opinion.

DATED:

s/William S. Lebov
WILLIAM S. LEBOV
Judge of the Yolo County
Superior/Municipal Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR YOLO COUNTY

STATE OF CALIFORNIA		No. 69606
	ss.	**CERTIFICATE OF MAILING**

I, the undersigned, certify under penalty of perjury that I am a Deputy Clerk of the above-entitled court and not a party to the within entitled action; that on June 1, 1993 I served true and correct copies of the foregoing/attached OPINION AND RULING by depositing them, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Post Office at Woodland, California addressed as follows:

BRENDA J. RUSSO, ESQ.
STAHNKE & RUSSO
LEGAL SERVICES FOR CHILDREN
733 WEBSTER STREET
FAIRFIELD, CALIFORNIA 94533

TIMOTHY MURPHY, ESQ.
555 CAPITOL MALL, SUITE 1540
SACRAMENTO, CALIFORNIA 95814

WILLIAM P. BRODBECK, ESQ.
716 - 10TH STREET, SUITE 100
SACRAMENTO, CALIFORNIA 95814

At the time of said mailing there was regular communication by United States Mail between the said place of mailing and the places so addressed.

Dated: June 1, 1993

s/Diana Fallbeck
DIANA FALLBECK, Deputy Clerk

SERVICE BY MAIL

I, Rose Marie Crouch,

I am a citizen of the United States and am employed in the County of Solano, State of California; I am over the age of 18 years, and not a party to the above-entitled action; that on August 4, 1993 I served the within **SETTLEMENT CONFERENCE STATEMENT** on the below listed party in said cause, by placing a true copy thereof enclosed in a sealed envelope with fully paid postage thereon in the United States Post Office in Fairfield, California addressed as follows:

LAW OFFICE OF, Jr.
WILLIAM BRODBECK
716 10th Street, #100
Sacramento, California 95814

LAW OFFICE OF
MURPHY AND JACOBS
TIMOTHY MURPHY
555 Capitol Mall, #1540
Sacramento, California 95814

YOLO COUNTY SUPERIOR COURT CLERK
Post Box 2175
Woodland, California 95695

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Fairfield, California on August 4, 1993.

s/Rose Marie Crouch
Rose Marie Crouch

Cites to Reporters Transcript of Trial Record re Violations Acknowledged or Admitted by Agency:

5 RT, pp. 1074, L:4-10	- Section 35169
5 RT, pp. 1130, L:4-18	- Section 35133
5 RT, pp. 1135, L:5-9	- Section 35169
5 RT. pp. 1144, 1145	- Section 35169
5 RT, pp. 1137, L:20-23	- Section 35169
5 RT, pp. 1139, L:13-20	- Section 35169
5 RT, pp. 1145, L:3-6	- Section 35169
7 RT, pp. 1688, L:4-11	- C.C. §222.26
7 RT, pp. 1670, L:10-11	- C.C. §222.26
7 RT, pp. 1670-71,L:20-3	- C.C. §222.26
7 RT, pp. 1735	- Section 35129
7 RT, pp. 1742-1744	- Section 35129
7 RT, pp. 1735, 1787	- Section 35133
7 RT, pp. 1790 - 1793	- Section 35133
8 RT, pp. 1807	- Section 35133
8 RT, pp. 1813 - 1817	- Section 35141
8 RT, pp. 1817	- Section 35145
7 RT, pp. 1745	- Section 35149
7 RT, pp. 1745, L:4-7	- Section 35151
7 RT, pp. 1748, L:19-21	- Section 35153
7 RT, pp. 1782, L:12-15	- Section 35134
7 RT, pp. 1784, L:15-18	- Section 35134
7 RT, pp. 1787, L:18-21	- Section 35134
7 RT, pp. 1788, L:23-25	- Section 35134
7 RT, pp. 1789, L:1-6	- Section 35134
7 RT, pp. 1790, L:23-25	- Section 35134
7 RT, pp. 1791, L:1-15	- Section 35134
8 RT, pp. 1822, L:18-25	- Section 35153
8 RT, pp. 1931, L:2-6	- Various regs.
8 RT, pp. 1931, L:7-11	- Various regs.
7 RT, pp. 1668-1675	- C.C. §222.26
7 RT, pp. 1792	- Section 35134
7 RT, pp. 1745, L:4-7	- Section 35151
8 RT, pp. 1807, L:12-15	- 35133, 35134
8 RT, pp. 1813-1824;	- Various regs.

Subchapter 5. Procedures for Agency Adoption

Article 1.Procedures Prior to Accepting a Relinquishment

§35129. Number in Interviews of Parents Considering Relinquishment

(a) The agency shall provide a minimum of two face-to-face interviews with parents who are considering relinquishment and who reside in California.

(1) The required interviews shall be provided over a period of two or more days.

(2) The agency shall provide the relinquishing parent with a sample copy of the relinquishment document and the Statement of Understanding at the first interview for their review.

(3) During the interview the agency shall explain to the parent the purpose of the agency and the services it provides.

§35133. Counseling Prior to Accepting the Relinquishment

(a) Prior to accepting the parent's relinquishment of the child for adoption, the agency shall provide counseling as appropriate to the category of parents as described at Section 35134 who reside in California.

§35134. Category of Parent and Counseling Services

(a) To a mother or a presumed father who has a legal right to physical custody of the child the agency shall:

(1) (Reversed)

(2) Inform the parent that he/she has the right to seek legal counsel to assist him/her in the relinquishment process:

(A) When appropriate the agency shall make referral to:

1. Legal resources including a lawyer referral services,
2. Legal aid offices, or
3. Other known public legal assistance.

(3) Provide all available information regarding alternative plans for the child, with a complete description of each alternative, including keeping the child, placement with extended family members, and/or foster care and reunification services.

(4) Inform the parent of at least

the following resources and make a referral when appropriate:

(A) Financial Resources.

1. The agency staff shall assist a parent in understanding the right to apply for public assistance, and shall cooperate with the public social service department staff in order to establish eligibility for aid.

(B) Employment resources.

(C) Education resources.

(D) Child care resources.

(E) Housing resources.

(F) Health service resources.

(5) Provide counseling services as needed to assist the parent with his/her feelings regarding the child and the long-range implications of

relinquishing the child for adoption.

(6) Advise the parent of the option of an independent adoption.

(7) Advise the parent regarding the extent to which the agency will or will not allow his/her participation in the selection of the adoptive family.

(8) Ensure that the parent is informed of and has indicated that he/she understands the meaning and legal effects of relinquishment and his/her legal rights in relation to the relinquishment process, including his/her options other than relinquishment as set forth in Section 35147(b)(1) and 35148(b)(1) and procedures for revocation

and recision of the relinquishment as set forth in Subchapter 5, Article 3.

(9) Advise the parent of the confidentiality of adoption records, what type of information is available to the parent and to the child before and after the adoption is final and the process to waive confidentiality.

§35135. Agency Determinations Prior to Accepting a Relinquishment

(a) Prior to accepting the parent's relinquishment of a child for adoption, the agency shall determine:

(1) That the parent had chosen the plan of adoption for the child and freely chooses to relinquish the child.

(2) That the agency is able to

place the child for adoption.

(3) ...

(4) That the parent, if residing in California, has received required counseling as appropriate to the category of parents commencing with Section 35134.

(5) That the parent has the ability to understand the content, nature and effect of signing the relinquishment.

§35141. Filing Options for the Relinquishing Parent

(a) The agency representative shall inform all parents:

(1) Of the time frame options for the filing of the signed relinquishment form with the department.

(A) The parent shall be permitted to request that the signed

relinquishment form be filed without a holding period.

(B) The parent shall be permitted to have the signed relinquishment form held for a specified period of up to 30 days before the agency submits it to the department for filing.

§35149. Accepting the Statement of Understanding

(a) The agency shall accept the parent's Statement of Understanding as follows:

(1) ...

(2) ...

(3) ...

(4) The agency shall give the parent the option of waiting a maximum of 14 calendar days before signing the relinquishment document.

(5) After the agency representative signs the Statement of Understand, the representative shall give the parent a copy of the signed form.

§35151. Accepting the Relinquishment Document

(a) The agency shall accept the parent's relinquishment document as follows:

(1) ...

(2) ...

(3) At the time the relinquishment document for adoption is signed, the agency shall:

(A) Present to the parent the statements required by Civil Code Section 222.15 and obtain a response from the parent in writing and the parent's

signature on the form.

(B) Advise the parent of the provisions of Civil Code Section 222.13

(D) Give the parent a copy of the completed relinquishment document.

§35153. Submitting the Relinquishment Form to the Department

(a) After completion of any holding period the agency shall:

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) Send the parent a copy of the filed relinquishment form.

§35155. Additional Counseling/Referral Services

(a) After accepting a

relinquishment, the agency shall provide additional counseling and/or referral services to the relinquishing parent as needed.

§35169. Expression of Intent to Rescind Relinquishment

(a) (Reserved)

(b) The agency shall treat a written or oral declaration by the relinquishing parent, after the relinquishment has been filed with the department, that he/she wishes to rescind his/her relinquishment and/or to have the child returned, as a request for recision.

(1) ...

(2) ...

(3) If the agency's decision is not to rescind, the agency

shall:

(A) Have the decision reviewed by the agency director or his/her designee.

(B) Provide a copy of the agency's decision not to rescind the relinquishment and the reasons for the agency's decision to the rescinding parent within three working days of the agency's decision.

(C) Send a copy of the agency's decision to the department within three working days of the agency's decision.

(4) In considering a relinquishing parent's request to have the relinquishment rescinded, the agency shall:

(A) Provide the parent the opportunity to present to the agency the reason for the

rescission of the relinquishment and the parent's plan for care of the child.

(B) Consider the needs of the child, the adequacy of the parent's plan and the public and community resources and services available to assist the parent in caring for the child.